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SUPREME COURT OF THE UNITED STATES.

October Term, 1883.—No. 229.

THE PHENIX BANK OF THE CITY OF NEW YORK,
Plaintiff in Error,

against

DAVID RISLEY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

WM. M. EVARTS,
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Of Counsel for Plaintiff in Error.

United States Supreme Court.

The Phenix Bank of the City
of New York,
Plaintiff in Error,

against

David Risley,
Defendant in Error.

No. 229.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The action was brought in the Supreme Court of the State of New York by the defendant in error to recover of the plaintiff in error $10,000, and interest from January 4, 1865, on a check of the Bank of Georgetown, South Carolina, addressed to the plaintiff in error, and payable to the order of the defendant in error.

The check was dated May 20, 1861, but was not formally presented for payment till January 10, 1865 (fols. 74 to 76), and the plaintiff in error had no knowledge of it till the afternoon of January 4, 1865 (fols. 72 and 91).

The amended complaint also contained a cause of action as upon an assignment to the defendant in error by the bank of Georgetown, of the same amount mentioned in the check on the same day that the check was drawn (fols. 56 to 59).

Originally the claim was made for $10,000 and interest from May 20, 1861, but the demand in the amended complaint was for $10,000 and interest from January 4, 1865.

Besides putting at issue the claims of the defendant in error, the plaintiff in error set up in its answer amongst other things, the seizure and confiscation by the United States of all the moneys mentioned in the amended complaint (fols. 60 to 64).

The plaintiff in error having succeeded on the first trial of the action, an appeal was taken to the General Term of the Supreme Court, where the judgment was reversed and a new trial ordered, and the opinion filed on such reversal is printed at fols 198 to 203.

The new trial was had before Mr. Justice *Van Brunt*, and a jury at circuit, and on that trial the only witness called in support of the suit was the defendant in error, and he alone testified in reference to the conversation and transaction, which his counsel claimed resulted in the oral assignment set out in the amended complaint, as the third alleged cause of action (fol. 69 *et seq.*), and on which the verdict was rendered, and his testimony on that subject put into narrative form was this : "On 20th May, 1861, the president of the bank of Georgetown said to me that he had a claim against the Phenix Bank for about $17,000 or $18,000, and offered to sell it to me; I asked him to name his price for it, and he did so; I asked him why he wanted to sell it; he said he was afraid he might lose it during the war, and was not willing to carry the risk that long; I offered him fifty cents on the dollar for the whole claim, which he declined; but he said he would sell it for Southern bank bills at par, and I told him I had not money enough to buy it; but, if he would divide it, and sell $10,000 of it, I would take that much; he said he would do that; then we closed the transaction; I asked him what kind of a transfer he would give me, and he said he would give me an order on the Phenix Bank for it; I paid him cash, and he gave me an order on the Phenix Bank for $10,000. There was some further conversation between us as to what he should give me—the form of transfer. I asked him how I had better have it; in what shape to make it the more easily collected, and he seemed to think it would be better to fill out that kind of an order; in fact, I thought so myself, and he filled out an order and gave it to me. This is a copy of the order ;

" $10,000. No. 3,255.

" Bank of Georgetown, S. C. Georgetown, May 20, 1861. Pay to the order of David Risley ten thousand dollars, J. G. Henning, Prest. To Phenix Bank, New York. Endorsed. Pay to the order of D. J. Seeley. David Risley (fols. 70 to 75).

"The president of the bank, after making this check, delivered it to me, and received the amount I agreed to pay him. I think the exchange took place about the same time; as he handed me one I handed him the other (fol. 71). I kept the check in my possession for a long time, but I finally endorsed it to D. J. Seeley, of St. Johns, New Brunswick, intending to send it to him, but, failing to get it there, it was returned to me, and I kept it among my papers from that time till it was presented" (fol. 72).

" *On May* 20, 1861, *I bought this check of them—the Bank of Georgetown* " (*fol.* 78). " I paid *for the check*, dollar for dollar, in Southern bank bills. I think I paid sixty-five cents for them" (fols. 78 and 79).

"In January, 1864, I sailed from St. Johns, Antigua, for St. Johns, New Brunswick; I then went to Mr. Seeley and asked him to re-indorse the check to me, so that I didn't want to have it obliterated in any way (fol. 81).

" *There is not any doubt about the fact that I paid the* $10,000 *for this check—not the slightest in the world.*" (fols. 88 and 89).

The plaintiff in error on that trial, as a defence to the action, proved that early on the morning of January 5, 1865, and previous to the service at 11:50 A. M., on the same day of the monition hereafter mentioned, the Marshal of the United States for the Southern District of New York seized $12,117.38, the amount of moneys in the possession of the plaintiff in error, standing to the credit of the Bank of Georgetown (fol. 94), which amount included the $10,000 sued for in this action.

And also that after such seizure had been made, and information or libel of information, which stated that such seizure had been made, was filed in the District Court of the United States, for the Southern District of New York (fols. 172 to 179), and a monition founded thereon was issued (fols. 180 to 182), and that the same was duly served on the cashier of the plaintiff in error at 11:50 A. M. of 5th January, 1865 (fols. 94, 168 to 170, and 179 to 182), and the said moneys attached and due notice given by the marshall, as required by law, and that subsequently the exact amount which had been seized, namely, $12,117.38, was paid over to said marshal on January 25, 1865, under a decree of the District Court of the United States, for the Southern District of New York (fols. 94, 170 to 172, 182 and 183).

About two years thereafter, namely, 17th January, 1867, this action was commenced (fol. 69). And the plaintiff in error also offered to prove that said seizure having been made as above stated, proceedings were had and taken under and by virtue of the two acts of Congress, entitled one " An Act to confiscate property used for insurrectionary purposes," approved August 6, 1861, and the other entitled " An Act to suppress insurrection, to punish treason and rebellion, to seize and canfiscate the property of rebels, and for other purposes," approved July 17, 1862 (12 Statutes at Large, p. 319 and p. 589), by the United States, to condemn and confiscate the said moneys. A copy of the record of these proceedings is printed between folios 172 and 196.

Those proceedings briefly stated, were as follows : On the 18th of November, 1863, Charles F. Allen filed with the District Attorney an information under the statute in regard to the money on deposit in the Phenix Bank belonging to the Bank of Georgetown (fol. 172) ; on 5th January, 1865, the day after Risleys's first interview at the Phenix Bank, the United States Marshall, by and under the authority of the President of the United States, and in obedience to the instructions of the Attorney-General of the United States, and to the directions of the District Attorney of the United States, for the Southern District of New York, and in pursuance of the two acts of Congress above mentioned, on land in the City of New York, in the Southern District of New York, seized the estate and property, money, stocks, credits and effects, to wit, $15,000, more or less, belonging to the Bank of Georgetown, a corporation doing business at Georgetown, in the State of South Carolina, which said $15,000 was then in cash and on deposit in the Phenix Bank, a corporation doing business in the City of New York, to the end that the same might be confiscated, forfeited, and condemned, as required and provided in the said acts of the

Congress of the United States (fols. 172 to 181). On the same day the District Attorney duly filed a libel of information in due form, which recited that such seizure had been made (fols. 172 to 180), and a monition was duly issued (fols. 170 to 182), in obedience to which the marshal attached $13,000, more or less, and gave due notice as required by law of trial and condemnation (fol. 181). Upon the return, judgment of condemnation and sale was duly granted upon default, January 24, 1864, against $12,117.38, the exact amount seized (fols. 94, 170 and 182). A writ of *venditioni exponas* was duly issued (fol. 184), and after the payment of the lawful fees and charges, the money condemned was distributed in equal shares to the United States and to the said informer under order of the court (fols. 186 to 196).

The plaintiff in error offered in evidence the original record of those proceedings, and also a complete copy of the said record properly exemplified (fols. 136, 170 to 196).

To the admission of the record, the defendant in error interposed twenty-six objections (fols. 136 to 140).

The court sustained one of the objections, and refused to admit the record and decree of the District Court in evidence, and the plaintiff in error duly excepted (fol. 139).

The court excluded the monition which had been served on the plaintiff in error after the money had been seized on January 5, 1865 (fols. 135 and 168), and which had been marked for identification Exhibit No. 1, and the plaintiff in error excepted (fols. 135) ; and also excluded the certified copy of the decree of the United States District Court served on the plaintiff in error, under which the moneys mentioned in the amended complaint had been condemned as forfeited to the United States, and under which the bank paid over the moneys to the United States Marshal, and which decree had been marked for identification Exhibit No. 2 (fols. 135 and 170), and the plaintiff in error excepted (fol. 135); and also excluded the marshal's receipt for those moneys written at the foot of the decree, and which had been marked for identification Exhibit No. 3 (fols. 136 and 171), and the plaintiff in error excepted (fol. 136).

The court also excluded the record of the confiscation proceedings which had been marked for identification Exhibit No. 8 (fols. 136 and 172 *et seq.*), on the ground (fols. 138 and 155) that those proceedings were directed against certain moneys, to wit, $15,000 more or less on deposit with the Phenix Bank, belonging to the Bank of Georgetown, whereas, in point of fact, "there was no money belonging to the Georgetown Bank in the Phenix Bank," but simply a credit in favor of the Georgetown Bank, which credit, as the learned judge maintained, was not confiscated (fol. 155) and the plaintiff in error excepted (fol. 165).

The jury having found a verdict for the defendant in error, the plaintiff in error appealed from the judgment entered on that verdict to the General Term of the New York Supreme Court (fols. 166 and 167).

The General Term affirmed the judgment, but wrote no opinion, and the plaintiff in error appealed to the Court of Appeals (fols. 203 to 207).

The Court of Appeals also affirmed the judgment on January 18, 1881, and on the day following, namely, January 19, 1881, a writ of error was duly issued, directed to that court, and the return and record were duly made up and filed in this court on February 28, 1881 (fols. 1 to 55).

The Court of Appeals, as appears from the opinion of the court delivered by Mr. Justice Andrews, held that the defendant in error could not recover either upon the first or second cause of action founded upon the check and stated in the amended complaint, because the check was a bill of exchange, and had not been accepted in writing as required by 1 N. Y. Revised Statutes, page 768, sec. 6, but affirmed the judgment upon the theory that the defendant in error had a valid oral assignment of $10,000 of the moneys of the Bank of Georgetown on deposit with the plaintiff in error, and that neither the seizure of those moneys by the marshal of the United States for the Southern District of New York, by and under the authority of the President of the United States, and in obedience to the instructions of the Attorney-General of the United States, and to the directions of the District Attorney of the United States for the Southern District of New York, &c., nor the condemnation thereof by the District Court of the United States for the Southern District of New York, nor the payment thereof to the marshal under the decree of that court, was any defense to the action (see Opinion of Ct. of Appeals, fols. 18 to 47).

The Court of Appeals did not consider the ground of objection upon which the trial judge rejected the record of the District Court, namely, that the proceeding to confiscate was against specific money, and not against the debt or credit of the Bank of Georgetown with the plaintiff in error, but based its decision on the ground that the record of the confiscation proceedings, if admitted in evidence would have constituted no defense to the action (see Opinion, *supra*).

ASSIGNMENT OF ERRORS.

(See fols. 11 to 16.)

1. That in the record and proceedings aforesaid, and in the giving of judgment aforesaid, there is manifest error in this, that by the said records and proceedings aforesaid, it appears that the judgment aforesaid, in form aforesaid given, was given against the said plaintiff in error, and in favor of the said defendant in error, against the exemption and protection claimed by the said plaintiff in error, as mentioned in the said record and proceedings aforesaid, under and by virtue of the seizure and confiscation on behalf of the United States, of the moneys also mentioned in the said record and proceedings, as having been deposited with the plaintiff in error, and against the exemption and protection claimed by the said plaintiff in error, under and by virtue of the decree of the District Court of the United States for the Southern District of New York, which condemned as forfeited to the United States the moneys mentioned and referred to in said decree and in the said record and proceedings aforesaid, and by reason of the delivery and payment over of said moneys by the plaintiff in error, under and by virtue of the seizure, forfeiture, and condemnation mentioned in the proceedings on which said decree was founded and of said decree.

2. And in this, that the Supreme Court of the State of New York, and also the Court of Appeals of the State of New York did decide against the validity of the authority of the President of the United States and of the Marshal of the United States to cause to be made or to make the seizure of the moneys aforesaid, and against the validity of the seizure, confiscation, and condemnation aforesaid.

3. And in this, that the said courts did decide against the validity of the authority aforesaid, and against the validity of the said seizure, and of the proceedings, record and decree of the said District Court of the United States for the Southern District of New York, as a bar and defense to the said action of David Risley, the defendant in error, also mentioned in the said record and proceedings hereinabove first mentioned.

4. And in this, that the said Supreme Court of the State of New York did exclude as evidence in said action, and as a bar and defense thereto the said proceedings, record and decree of the said District Court.

5. And in this, that the Court of Appeals of the State of New York, decided against the validity of said proceedings, record and decree of said District Court and against the claim of the plaintiff in error, that the same and the payment thereunder were a complete bar and defense to the said action of the said David Risley, defendant in error, and in favor of the claim made by the defendant in error, to recover in said action against the plaintiff in error.

6. And in this, that there was drawn in question the validity of a statute of, or an authority exercised under the United States, and the decision was against their validity.

7. And in this, that there was drawn in question the construction of Statutes of the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under said statues.

Whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff in error and in favor of such exemption and protection so claimed by the plaintiff in error as aforesaid, and in favor of admitting and allowing the said seizure, confiscation and condemnation, and the payment thereunder of said moneys as a defense to said action, and in favor of admitting and receiving in evidence the said proceedings, record and decree of said District Court as a bar and defense to said action, and in favor of the validity of said statute of or authority exercised under the United States, and in favor of the title, right, privilege or exemption specially set up or claimed under the said Statute of the United States, and against the validity of the said claim of the defendant in error to recover of said plaintiff in error.

BRIEF OF THE ARGUMENT.

First Point.

The court has jurisdiction of this case.

(*a.*) The jurisdiction of this court over cases removed from State courts by writs of error, is derived from the Constitution of the United States, and from § 709 of the U. S. Revised Statutes, and this court holds the following propositions as governing its examination and its judgments and decrees in this class of cases under the statute as now found in the recent revision of the acts of Congress, namely, in the said § 709.

1. That it is essential to the jurisdiction of this court over the judgment or decree of a State court, that it shall appear that one of the questions mentioned in the statute must have been raised and presented to the State court; that it must have been decided by the State court against the right claimed or asserted by the plaintiff in error, under the constitution, treaties, laws, or authority of the United States, or that such a decision was necessary to the judgment or decree rendered in the case.

2. These things appearing, this court has jurisdiction, and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State court.

3. If it finds that it was rightly decided, the judgment must be affirmed.

4. If it was erroneously decided, then the court must further inquire whether there is any other matter or issue adjudged by the State court sufficiently broad to maintain the judgment of that court, notwithstanding the error in the decision of the Federal question. If this be found to be the case, the judgment must be affirmed without examination into the soundness of the decision of such other matter or issue.

5. But if it be found that the issue raised by the question of Federal law must control the whole case, or that there has been no decision by the State court of any other matter which is sufficient of itself to maintain the judgment, then this court will reverse that judgment, and will either render such judgment here as the State court should have rendered, or will remand the case to that court for further proceedings, as the circumstances of the case may require.

Murdock *v.* City of Memphis, 20 Wall., 591, 625 and 626.

(*b*) This case is within the provisions of § 709 of the Revised Statutes of the United States. That section is as follows :

§ 709. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity ; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity ; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity, specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.

The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States; and the proceeding upon the reversal shall be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case and award execution, or remand the same to the court from which it was so removed.

The Supreme Court may re-affirm, reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

The plaintiff in error proved on the trial, by evidence which was not controverted, that the whole balance of the moneys, namely, $12,117.38 on deposit with it, belonging to the Bank of Georgetown, was seized by the marshal of the United States for the Southern District of New York, early on the morning of 5th January, 1865, under color of Federal law, and that subsequently, and on the 25th of that month, those moneys were confiscated, and were demanded by and taken by that marshall, under color of Federal law, and of a decree of the United States District Court for the Southern District of New York (fols. 94–95, 168 to 172), and the plaintiff in error claims that such seizure and confiscation, and such taking by said marshal, which was made about two years prior to the commencement of this action (fol. 69), were a bar and defense to 'this action, and the Court of Appeals being the highest court of the State of New York in which a decree in the suit could be had, decided against the exemption and protection claimed by the plaintiff in error under and by virtue of the said seizure and confiscation of said moneys, and under and by virtue of such taking, and thereby there was drawn in question the validity of an authority exercised under the United States, and the decision was against their validity, and thereby an immunity was claimed, under statutes of the United States (namely, the Confiscation Acts), and an authority exercised under the United States, and the decision was against the title, right, privilege or immunity specially set up or claimed by the plaintiff in error under such statutes and authority.

The said court also decided against the validity of the said seizure as against the interest of the defendant in error in the said moneys so seized as aforesaid, and also against the validity of the proceedings, record and decree of confiscation as a bar and defense to this action, and in favor of excluding as evidence in said action as a bar and defense thereto the said proceedings, record and decree, and thereby there was drawn in question the construction of the said statutes of the United States and the decision was against the title, right, privilege or exemption specially set up or claimed under such statutes.

The value in dispute in the action was over $25,000, and the writ of error was issued the day after the entry of the judgment. The answer to the amended complaint (fol. 60), the record of the trial, and the opinion of the Court of Appeals, show the questions which were presented, and the manner in which they were decided. And since the amendment of the Judiciary Act and the enactment of section 709 of the U. S. Rev. Stat., this court will look into the opinion to ascertain what questions were presented and how they were decided.

Murdock *v.* City of Memphis, 20 Wall., 633 and 634.

The opinion of the Court of Appeals (fols. 18 to 47) is returned as part of the record, as required by Rule 8.

Thus it appears that the plaintiff in error raised and presented to the court, by pleadings and other appropriate methods, questions specified in the statute, and that their decision was necessary to the determination of the cause, and they actually were decided against the plaintiff in error, and that the judgment as rendered could not have been given without deciding them.

Second Point.

The Court of Appeals erred in deciding that the exclusion, on the trial of this action, of the record of the District Court of the United States for the Southern District of New York, offered to sustain the defense alleged in the answer, that the deposit in the Phenix Bank to the credit of the Bank of Georgetown was, on 5th January, 1865, duly seized and attached in pursuance of proceedings instituted on that day by the United States, under the two Confiscation Acts above mentioned; and that, on 25th January, 1865, in pursuance of the decree of the court, duly made in such proceedings, the plaintiff in error paid over to the marshal the sum of $12,117.38, the whole amount of the credit of the Bank of Georgetown with the Phenix Bank, was not error, and in deciding that the record of the confiscation proceedings, if admitted in evidence, would have constituted no defense to the action.

The Court of Appeals conceded that, if the proceedings to confiscate the money on deposit with the plaintiff in error were proceedings *in rem*, then the adjudication of the District Court would have concluded the defendant in error from contesting the fact that the property condemned was, at the time of the seizure and decree, the property of the Bank of Georgetown.

But that court said: "As we understand the decisions of the Supreme Court of the United States in Day *v.* Micou, 18 Wall., 156, and Conrad *v.* Waples, 96 U. S., 279, confiscation proceedings under the acts of Congress referred to, while in *the nature* of proceedings *in rem*, operate only to divest the title and interest of the party alleged to be the owner of the property seized, and as against whom the seizure is made, and that judgment of confiscation and forfeiture does not divest the title of third persons originating prior to the seizure, or of the real owner not proceeded against."

We respectfully submit that neither of the cases cited sustains the conclusion reached by the Court of Appeals in this case.

Day *v.* Micou, 18 Wall., 156, relied upon by the Court of Appeals, came before this court upon error to the Supreme

Court of the State of Louisiana, and the question decided was that under the Act of July 17, 1862, and the Joint Resolution of the same date, explanatory of it, only the *life estate* of the person for whose offense *land* had been seized, was subject to condemnation and sale.

By that Joint Resolution (12 U. S. Statutes at Large, p. 627), explanatory of the Act of July 17, 1862 (12 *Ib.*, 589), passed on the same day with it, it was resolved by Congress that no punishment or proceedings under the act should be "*so construed as to work a forfeiture of the real estate of the offender beyond his natural life.*"

Bigelow *v.* Forrest, 9 Wall., 350, cited by Mr. Justice Strong, in Day *v.* Micou, mentioned above, was an action of ejectment to recover *lands* of the son of French Forrest, which were claimed by Bigelow under title derived from confiscation proceedings had under the Confiscation Act of July 17, 1862, "*against all the right, title and interest and estate of the said French Forrest in and to the said tract of land,*" and in that case, which was brought before this court on error to the Supreme Court of Appeals of Virginia, it was stated that "It was a part of the history of this legislation of July 17, 1862, that the then President, Mr. Lincoln, immediately after the passage of the *act* by both houses of Congress, had prepared the draft of a message objecting to the provisions that might result, 'in the divesting of title forever,' and suggesting or showing that the bill, as Congress had passed it, was in conflict with that clause of the Constitution which ordains that 'no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted' (Art. 3, § 3, clause 2); that before this message was presented to Congress, the Joint Resolution, above quoted, was passed to remove his objection; and that the President, in a message of July 17, 1862, mentioned, that before he was informed of the resolution, he had proposed the draft of a message stating objections to the bill becoming a law; a copy of which draft he submitted; and also mentioned that, considering the Act of Congress and the Joint Resolution explanatory thereof, as substantially one, he approved and signed both," and Mr. Justice Strong in delivering the opinion of the court in that case, said in reference to the Confiscation Act of July 17, 1862, at page 350:

"Concurrently with the passage of this act, Congress also adopted a joint resolution explanatory of it, whereby it was resolved that no punishment or proceedings under the act should be so construed as to work a forfeiture of the *real estate* of the offender beyond *his natural life*." "It is a well-known fact in our political history that this resolution was adopted in consequence of doubts which the President entertained respecting the power of Congress to prescribe a forfeiture of larger duration than the life of the offender. Be this as it may, the act and the resolution are to be construed together, and they admit of no doubt that all which could, under the law, become the property of the United States, or could be sold by virtue of a decree of condemation and order of sale, *was a right to the property seized.* It follows, then, that *the estate* acquired by the purchaser at the marshal's sale, expired on the 24th day of November, 1866, when French Forrest *died*." And at page 352, "We have already remarked that the act and the contemporaneous resolution must be construed together." "The latter declares that the act shall not be construed to work a forfeiture of the *real estate* of the offender beyond *his natural life*." "It can do this neither directly nor indirectly." "The punishment inflicted upon him is not to *descend to his children*." "His *inheritable* blood is not *corrupted*."

Now, returning again to Day *v.* Micou, 18 Wall., p. 160, we find Mr. Justice STRONG, in delivering the opinion of the court, said: "Most of the questions in this case were settled adversely to the claims of the plaintiff in error by our decision of Bigelow *v.* Forrest." "We then determined that under the Act of Congress of July 17, 1862, known as the Confiscation Act, and the Joint Resolution of the same date explanatory thereof, only the *life estate* of the person for whose offense the *land* had been *seized* was subject to condemnation and sale. We also determined that nothing more was within the jurisdiction or judicial power of the District Court, and that consequently a decree condemning the *fee* could have no greater affect than to subject *the life estate to sale.* This in effect disposes of the present case." And at pages 161 and 162, "What property is thus brought within the jurisdiction of the District Court?" "Beyond doubt the property which had been *seized*, that is, *the estate and property* of the offending person, and no other." "*If it was a term, or an estate at will, or a life estate, or an estate in joint tenancy, or in common, whatever it was, it was the subject alike of seizure and of condemnation.*" "It is true, proceedings *in rem* were ordered to be instituted in the District Court; but the question remains, what was the *res* against which the proceedings were directed?" "*The answer must be, that which was seized and brought within the court.*"

It will be observed that in the case of Day *v.* Micou, cited by the Court of Appeals, and mentioned above, and also in the case of Bigelow *v.* Forrest, above referred to, the confiscation proceedings were had under the Act of July 17, 1862, and not under the Confiscation Act of August 6, 1861, also; and in each of those cases, only the *life estate* in *real estate* was seized or proceeded against.

Conrad *v.* Waples, 96 U. S., 279, was the only other case cited by the Court of Appeals in support of its determination that the exclusion of the confiscation record was not error.

In that case, also, the confiscation proceedings relied upon were also had under the Act of July 17, 1862, and were against the interest of the elder Conrad in *real estate*, and not against the interest of his son, the plaintiff.

In none of the cases above mentioned did this court pass upon or refer to the Confiscation Act of August 6, 1861. Nor was any suggestion made that the proceedings under the Act of July 17, 1862, were not proceedings *in rem*. In each of those cases the latter act, as interpreted by the joint resolution of Congress, above referred to, was the subject of consideration and construction in cases where a *life estate* in *real property* was concerned. Indeed, the instances mentioned in Conrad *v.* Waples, and stated in the opinion of the Court of Appeals, of decrees of courts of probate and orphans' courts, directing sales for the payment of a decedent's debts, or for distribution, show the distinction which this court made to be that the court could confiscate what was *seized*. In other words, that only a *life estate* in *real property* could be *seized* or *confiscated*.

Where, however, personal property, such as a credit or debt or money, is seized or proceeded against, the whole property is condemned.

Where the *entire* property is *seized*, the *entire* property is *condemned and confiscated.*

This is apparent from the following remarks, at page 268, in Conrad *v.* Waples: "In admiralty cases and in revenue cases a condemnation and sale *generally pass the entire title to the property condemned and sold.* This is because the thing condemned is considered as the offender or the debtor, and *is seized in entirety.*"

In this case the marshal seized and attached, and took from the plaintiff in error not *some interest in the money on deposit*, but the actual cash, $12,117.38, in its *entirety.* Unless the marshal could *seize*, and the court *condemn*, and the government *confiscate* the *entirety* of the *debt, credit and money*, then no force or effect could be given to those parts of the confiscation acts which provided for the seizure, condemnation and confiscation of *debts, credits and moneys* which are specially named in those acts.

If, however, the interest of the defendant in error in $10,000 of the $12,117.38 was not *seized*, *condemned or confiscated*, still the conclusion of the Court of Appeals was erroneous, for the defendant in error could only proceed against the *United States*, and *the informer, Charles F. Allen*, who actually received the $12,117.38 two years before this suit was commenced.

Whether or not the defendant in error had or still has an interest in $10,000 of that money, it is clear that no recovery could be had against the plaintiff in error by him years after the whole deposit, including the interest of every body therein had been in fact *seized and taken from the plaintiff in error* by superior force, *vis major*, under color of Federal authority and Federal law.

There is, therefore, no force in the claim of the defendant in error, that if the Bank of Georgetown assigned to him $10,000 of the debt due by the plaintiff in error before the seizure was made, the seizure and decree of condemnation, and the payment made under it, would not be a bar to this action.

The proceedings were *in rem*, and the *res* was the money on deposit, or, in other words, the credit standing in the name of the Bank of Georgetown on the books of the defendant, a part of which identical money or credit the defendant in error claimed belonged to him.

The proceedings being *in rem*, the whole world, *including the Bank of Georgetown and the defendant in error were parties to those proceedings*, notice of which, after the *res* had been seized, was given, as required by law, to the world, including *the Bank of Georgetown and the defendant in error.*

The United States marshal seized $12,117.38 (fol. 194) *in its entirety*, the whole amount to the credit of the Bank of Georgetown, on the 4th of January, 1865, when the defendant in error called at the banking house of the plaintiff in error on that afternoon (fol. 84), and that amount of money in its entirety was paid over to the marshal, under the decree, on January 25, 1869 (fol. 95).

Not only were the proceedings against the identical *res*, $10,000 of which the defendant in error claimed as his, and not only did he have the usual legal notice thereof, and of the seizure by the marshal, and of the proceedings to condemn it, but he also had actual personal notice of the fact from the plaintiff in error, and he also called upon the United States District Attorney in person, who said to him: "This money belongs to the Government. The Bank of Georgetown had no right to draw such a check as that" (fol. 73).

For weeks after that personal notice from the District Attorney to the defendant in error, that the Government claimed the whole *res* in its entirety notwithstanding the claim of the defendant in error upon it, he was afforded an opportunity, as was also the Bank of Georgetown, and, in fact, the whole world to intervene in the United States District Court, and establish a claim to the *res*, or to any part thereof, *or interest therein*, and to resist the application of the United States District Attorney for a decree of condemnation.

This he failed to do, and instead went on to Washington to induce the Secretary of the Treasury to instruct the District Attorney to have the seizure by the marshal removed, and the proceedings withdrawn, to the end that the *res* might not be condemned, and that $10,000 thereof might be paid to him (fol. 83). The Government claimed that the *res* belonged to the Bank of Georgetown, and the court so adjudged, and that judgment is binding upon the whole world, and conclusive against the defendant in error. He had his day in court, and he wilfully allowed judgment to go against him by default, and in this suit—this collateral proceeding—the correctness of that judgment cannot be questioned, and hence it is no answer to the claim of the plaintiff in error that that judgment and the payment under it, are a bar to this action for the defendant in error to say that in fact the *res, or the whole of it in its entirety,* did not belong to the Bank of Georgetown, but that if he had intervened he could have established a claim to it to the extent of $10,000.

The cases relied upon by the defendant in error, and cited by the Court of Appeals, were cases where the *land*, the *fee* of which had not been and could not have been *seized or confiscated* by reason of the prohibition of the Constitution, and of the interpretation of the Act of July 17, 1862, by the joint resolution of Congress above mentioned, but which *remained in the possession of the defendant in error*, or were sought to be reached by the plaintiff in error.

The first, second and third sections of the Confiscation Act of August 6, 1861, "An Act to Confiscate Property used for Insurrectionary Purposes" (12 U. S. R. S., 319), provided for property being "seized, confiscated and condemned" as lawful "prize and capture," and clearly show that the proceedings are to be *in rem.*, and the Act of July 17, 1862, expressly provides in § 7 that the condemnation proceedings shall be proceedings *in rem.*

Thus it appears that the Court of Appeals erred in deciding that the proceedings were not *in rem.*, and that only the interest of the Bank of Georgetown was *seized* and confiscated, and that the decree of the District Court was not conclusive on the question that the Bank of Georgetown owned the $12,117.38 seized and confiscated, and that the record of the confiscation proceedings, if admitted in evidence, would have constituted no defense to the action.

Third Point.

The Court of Appeals erred in deciding that the record of the District Court was not a defense to this action, and in deciding that no jurisdiction was acquired by the District Court to proceed for the forfeiture of the debt owing by the Phenix Bank to the Bank of Georgetown, *because that court had jurisdiction of the subject matter of the proceedings and of the res, and its decree was a perfect defense to the action until reversed or modified on appeal.*

See Confiscation Proceedings, fols. 172 to 196.

(*a*) The court had jurisdiction, for "the power to hear and determine an action is jurisdiction." The United States *vs.* Arredondo, 6 Peters, 709.

Grignon's Lessee *v.* Astor, 2 Howard's U. S. R., 338.

Burrill's Law Dictionary, vol. 2, p. 113.

In a recent case, in this court Mr. Justice Swayne, in delivering the opinion of the court, thus defined jurisdiction: "Jurisdiction is *only* the right to hear and determine. The result of its exercise is the judgment of the court."

Daniels *v.* Tearney, 102 U. S. 418.

The District Court had power to hear and determine the information, by virtue of the two acts of Congress referred to, one being entitled "An Act to confiscate property used for insurrectionary purposes," and the other being an act entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."

12 Vol. Statutes at Large, p. 319 and p. 589.

To the admission of the Record of the United States District Court, in the Confiscation Proceedings, the defendant in error interposed twenty-six objections (fols. 136 to 140). The trial court sustained one of the objections, and refused to admit the record and decree of the District Court in evidence, and the defendant duly excepted (fol. 140).

Besides the exclusion of the record, to which the plaintiff in error excepted, his Honor, the trial judge, also charged as follows:

> "Your attention has been called to the fact, that as far as the Phenix Bank is concerned, it has been claimed upon their part that they have paid their money under the lawful authority of the United States to the United States. Now, gentlemen of the jury, I have already ststed, in your hearing, the reason why that fact is not so. *It is a very nice question of law, upon which I may be mistaken, but I have an opinion about it, and, as according to that opinion, it seemed to me that it was necessary that these proceedings should be shut out—you have nothing to do with anything in regard to those proceedings.* I applied the rule of law, holding that the proceedings under the confiscation act, being for the purpose of depriving a man of his property, must be proceeded with according to the terms of the act, and as those terms have been expounded by the court, in order that a man may be deprived of his property, and that there are no intendments in favor of proceedings of that description. The proceedings in this case, as I have already said, did not comply with the terms of the statute, they did not confiscate the credit. There was no money belonging to the Georgetown Bank in the Phenix Bank. There was a debt due from the Phenix Bank to the Georgetown Bank, and that debt was never confiscated, and as a result the Phenix Bank, in paying over the money in the way they did, have acted in their own wrong, and so far as the Georgetown Bank and Mr. Risley are concerned, they have a claim against the Phenix Bank for the amount of this money, the same as if this proceeding had never been instituted" (fol. 154 *et seq.*)

This is the only ground on which the judge excluded the record and not on the ground that the judgment, while it stood, was not conclusive.

This does not proceed on the ground that the judgment was irregular, or wanting in jurisdiction, but that the proceedings did not in terms embrace, as the *res* brought into court, the debt due from the Phenix Bank to the Bank of Georgetown.

It is respectfully submitted that the seizure and confiscation covered the *credit*, as well as the money, and that the distinction of the learned judge, as applied to the decree of the United States District Court, is unreasonable in fact and unsound in law. In the first place, it ought to be remarked that the decree of condemnation and sale does not purport in its phraesology to confiscate any specific coin or bills on deposit in the Phenix Bank, or any special deposit of any kind, but it orders, sentences and decrees that twelve thousand one hundred and seventeen $\frac{38}{100}$ dollars belonging to the Bank of Georgetown, of Georgetown, in the State of South Carolina, and then on deposit in the Phenix Bank in the City of New York, *which said twelve thousand one hundred and seventeen $\frac{38}{100}$ dollars had been theretofore seized by the marshal in that proceeding, be condemned, &c.*, (fols. 171 and 183). Now this description of the *res*, or thing to be confiscated, appears to be the specific and accurate designation of the liability of the Phenix Bank to the Bank of Georgetown, in form and substance. We claim that, as the expression is used not only by business men the world over, but also by the expounders of the law, it is correct to say that the Bank of Georgetown had on deposit in the Phenix Bank, 12,117$\frac{38}{100}$ or that there was on deposit in the Phenix Bank, belonging to the Bank of Georgetown, \$12,117$\frac{38}{100}$; and this expression, both in the common and technical acceptance of the words, and in the eye of the law, means one thing and only one thing. It means that \$12,117$\frac{38}{100}$ belonging to the bank of Georgetown was placed by it on the ordinary or general deposit in the Phenix Bank, and that thereupon the specific money deposited became the property of the Phenix Bank, while the Bank of Georgetown became entitled to a credit or chose in action to that amount. In other words, the decree of condemnation is exactly what the court below says it ought to be. The phrase to be met with throughout the confiscation proceedings " on deposit in the Phenix Bank," that is "on general deposit," which the learned judge altogether discarded in giving his construction, conveys the very idea of "credit," which he deemed essestial. Nor would it be an appropriate or correct expression to say that the Bank of Georgetown had *on deposit* in the Phenix Bank a *credit* to a certain amount. The term "money" rather than the term "credit" is the proper one to be coupled with the phrase "on deposit." To illustrate how confusing and unnatural is the distinction to which the court below attached such immense importance between the expression "money" or a "sum of money," as used in the decree of condemnation, and the term "credit," which, in the opinion of the court, should have been used, the learned judge himself, with the distinction still fresh in his mind, on the very same page of his charge, in which he had announced that "there was no money belonging to the Georgetown Bank in the Phenix Bank" (fol. 155), no less than three times employs, in connection with the words "*on deposit*," the very expression which he condemns as fatally incorrect in the decree of confiscation.

He says (fol. 155): "There are some conceded facts in "this case, gentlemen, and to those I will call our atten-"tion. * * * It is conceded the Bank of Georgetown "had on *deposit* with the Phenix Bank *a considerable sum* "*of money.* * * * It is conceded that that *money* re-"mained *on deposit*, or the majority of it remained on de-"posit. * * * It is further conceded that, on the 1st "day of January, 1865, the Bank of Georgetown had *on* "*deposit* to its credit with the Phenix Bank the *sum of a* "*little over* $12,000."

This well selected language of his Honor appears to us to be a conclusive refutation of his own objection.

The counsel for the defendant in error who presented to the learned judge the ground of objection to the admission of the District Court record, which we are now considering, falls into palpable inconsistencies in the course of his argument upon this point. He objects (No. 13, fol. 137) that it does not appear that the specific *res* or money was in the actual custody or presence of the District Court when it pronounced its decree, which he submits is necessary, in order to give the court jurisdiction, and almost in the next breath he objects (No. 26, fol. 139) that the decree of the District Court ought not to have been directed against *money* because the Bank of Georgetown owned nothing but a *credit*. putting these two objections together it would appear impossible to seize and confiscate a credit according to law, whereas, on the other hand, the confiscation acts, in express language, declare a credit to be confiscable.

Further than this, particular attention is called to the fact that the amended complaint itself, in setting forth the alleged causes of action in the case at bar, repeatedly makes use of the very expression to which the court below has taken exception as employed in the decree of the United States District Court. We find in the amended complaint the following allegations:

"That on and prior to the 20th day of May, 1861, the "Bank of Georgetown * * * had *on deposit* "with the Phenix Bank of the City of New York *money* "to an amount largely exceeding the sum of ten thousand "dollars. * * * That on or about the 20th "day of May, 1861, while *said amount, exceeding ten thousand dollars*, was *so on deposit* in the hands of the defendant, *and belonging to the said Bank of Georgetown*" (fols. 56 and 57).

"That on the 20th day of May, 1861, * * "the defendant held *on deposit* for and on account of the "said Bank of Georgetown, and subject to its order, *a* "*large sum of money, to wit, twelve thousand dollars*" (fol. 58). "That afterwards, to wit, on or about the 4th day of "January, 1865, the *said large sum of money* deposited by "the Bank of Georgetown, as aforesaid, *being still on* "*deposit* with the defendant, the plaintiff duly presented "said check, * * and thereupon the defendant, "by its cashier, admitted that *said sum of money*, deposited "as aforesaid, still remained *on deposit*" (fol. 58).

Now, it certainly appears to be an unjust ruling to hold that while the *res*, against which the confiscation proceedings were directed, is described in exactly the same language as that which designates the cause of action in the case at bar, the record of the confiscation proceedings is irrelevant, and must be shut out on the ground that *the subject of the two actions is not the same.* That appears to be an extraordinary objection on the part of the defendant in error to the introduction of the United States proceedings, which consists solely in contradicting the solemn averments of his complaint.

Such refined criticism cannot be applied to the judgment of a court of competent jurisdiction which innocent third parties are commanded to obey upon pain of punishment for contempt in case of disobedience. If any strict rules of construction were applicable to the confiscation proceedings, it was the United States District Court that was bound to apply them before rendering its decree, and not the Supreme Court, in interpreting the meaning of that decree. There is no consideration of public policy, and no rule of law which requires that such a construction shall be given by a sister court, to the solemn judgment of a court of competent jurisdiction, as will nullify its unmistakable meaning, or as will undoubtedly serve to entrap those to whom its commands are directed.

But, besides the phrase "on deposit in the Phenix Bank," there is another descriptive phrase applied to the *res* in the decree of the United States District Court, which the learned judge in the court below seems to have overlooked, viz.: "which said twelve thousand one hun-"dred and seventeen $\frac{38}{100}$ dollars has been heretofore "seized by the marshal in this proceeding" (fol. 171). This language indicates that what was *seized* by the marshal was *confiscated by the court*, and the inquiry naturally arises, what did the marshal *seize;* and also, the further inquiry, had the marshal the right, as a method of seizing the credit or chose in action, to compel or to allow the Phenix Bank actually to pay over to him at the time of the seizure money to a like amount. If he had this right, and exercised it, or if the court considered that he had constructively exercised it, by giving the Phenix

Bank notice of seizure, and subsequently serving upon them the monition or order of attachment issued by the court, so that the court regarded the money as already in its custody, and thus in its hands to be dealt with as a specific *res*, then it was undoubtedly proper that all the papers in the proceedings, subsequent to the preliminary seizure required by the statute, should be directed against a sum of money rather than against a so-called credit. Any form of words which clearly identified the thing intended, would seem to be sufficient; but the former description of the *res* would obviously be more in accordance with the theory of the court, and more in analogy with the practice in Admiralty and revenue cases, to which the confiscation proceedings are by the terms of the statute, to conform as nearly as may be.

In Miller *v.* U. S., 11 Wall, 299, perhaps the most carefully considered case in the reports under the two confiscation acts above mentioned, Justices Field and Clifford dissenting, express the view in elaborate opinions, that the constructive seizure in that case was not sufficient to give the court jurisdiction. However, the court held that a constructive seizure under the confiscation acts is sufficient, and the whole course of the argument indicated that the specific *res* is thereby *supposed* to be delivered over into the custody of the court.

In the case of Mauro *v.* Almeida, 10 Wheat., 493, cited approvingly in the Miller case, the court say: "To all "questions which may be supposed to arise on this point "of the case we give one general answer, viz.: that as "goods and credit in the hands of a third person, wher"ever situated, may be attached by notice, there cannot "be a reason assigned why the goods themselves, if ac"cessible, should not be actually attached."

So also in Tyler *v.* Defrees, 11 Wall., 349.
Cooper *v.* Reynolds, 10 Wall., 308.

If, then, the marshal, in making the preliminary seizure of the credit, had the lawful authority, either without or with the consent of the Phenix Bank, to take the money itself into his actual possession, that would seem entirely to remove the objection raised by his Honor Mr. Justice VAN BRUNT; for we may, if we choose, presume, under the authority of the decision of the United States Supreme Court, that the marshal, in making the seizure, said to the bank officers, under such and such instructions, and under such and such authority, I seize the *credit* due from your bank to the Bank of Georgetown, and demand that you pay over to me *money* to that amount.

See Miller *v.* U. S., 11 Wall., 299.
The Confiscation Cases, 20 Wall., 92.
Tyler *v.* Defrees, 11 Wall., 331.

To sum up our suggestions on this point:

The thing recovered here is undoubtedly the amount, with interest, of a portion of a sum deposited by the Bank of Georgetown with the Phenix Bank.

The question is, whether that is *the thing* confiscated by the decree of the District Court and seized by the marshal.

That is the *identical thing*, we most confidently contend.

1st. The plaintiff's complaint describes it a sum on deposit with the defendant, and so deposited by the Bank of Georgetown.

2d. The decree describes it as a sum belonging to the Bank of Georgetown on deposit in the Phenix Bank, and *heretofore seized by the marshal.* (This sum so deposited by the Bank of Georgetown had been seized by the marshal.)

3d. The law, upon this description, *i. e.*, "a sum belonging to the Bank of Georgetown on deposit with the Phenix Bank," affixes certain legal consequences and results. The money so deposited becomes due from the depositary to the depositor as a debt merely.

4th. Necessarily, therefore, such description always legally decribes and represents a sum deposited, and a debt thereby created to the depositor from the depositary.

5th. When therefore the description in the decree is of money belonging to A, on general deposit with B, a bank; this description legally and necessarily defines "the thing" condemned to be a *debt* due from the bank to the depositor, arising from a deposit of that amount.

6th. If by that description was meant any other thing as so much coin, the property of A, deposited, to be returned in specie by the bank, it should have given the traits which distinguish a bailment from a debt, *particularly*. The ordinary description of a sum of money belonging to the depositor deposited in the bank unlimited and unexplained, necessarily describes a debt of the bank arising from a deposit there of the depositor's money, and nothing else or more.

But to find the description of the seizure and of the nature of the *res* when it was seized, it is appropriate to refer, not to the decree, but to the libel of information, which, like a declaration or bill in equity after default, is taken *pro confesso* (The Confiscation Cases, 20 Wall., 92; Miller *vs.* U. S., 11 Wall., 292). The libel of information offered in evidence in the case at bar runs against "the "estate and property, money, stocks, *credits*, and effects "to wit: against $15,000 (fifteen thousand dollars) more or "less, belonging to the Bank of Georgetown, a corporation "doing business at Georgetown, in the State of South "Carolina, which said $15,000 is now in cash and is now on "deposit in the Phenix Bank, a corporation doing business "in the City of New York. All of which are owned by and "belonging to and are of the property, estate and effects "of," &c. (fols. 172 and 173).

In describing the prelimiminary seizure, it recites:

"That Robert Murray, Esq., the Marshal of the United "States for the Southern District of New York, heretofore "—to wit, on the fifth day of January," &c., under such and such authority, "seized the estate and property, "money, stocks, *credits* and effects aforesaid, to the end "that the same might be confiscated, forfeited and con-"demned, as required and provided in the said acts of the "Congress of the United States" (fol. 173).

The same careful and comprehensive description, conforming exactly to the phraseology and requisites of the statutes, is used throughout the libel (fols. 174, 176, 177, 178, 179). Moreover, the more particular description of the money on deposit (fol. 172) is alleged with a "to wit," the object and result of which are to relieve the words following the "to wit" from the strict common law rules in regard to variance.

Stephens on Pleading, p. 292, and cases.

The credit was lawfully seized by the marshal, and the money was lawfully paid over by the Phenix Bank at the time of the seizure, and the said seizure in itself ought to be a sufficient defense to the bank, unless the money had been afterwards refunded to it, because the bank was not responsible for the regularity of the subsequent proceedings taken by the District Attorney.

Pike *v.* Wassel, 4 Otto, 712.

The United States Supreme Court has repeatedly held, after full discussion, that proceedings under the two confiscation acts must not be strictly construed as to matters of form, as in the case of criminal proceedings, but liberally, with a view to carrying out the objects of the statutes.

The Confiscation Cases, 20 Wall., 92.
Miller *v.* U. S., 11 Wall., 292.
Tyler *v.* Defrees, 11 Wall., 331.

The proceedings in the District Court were regular in practice and in accordance with the provisions of the two confiscation acts under which they were brought.

Act of Aug. 6, 1861, 12 Stat. at Large, 319.
Act of July 17, 1862, 12 Stat. at Large, 589.
Miller *v.* U. S., 11 Wall., 299.
The Confiscation Cases, 20 Wall., 92.
Tyler *v.* Defrees, 11 Wall., 331.

The judgment of a court of the United States, the subject matter of which is within its jurisdiction, cannot be impeached by a State court.

Kemp's Lessee *v.* Kennedy, 5 Cranch, 185.
Opinion of Marshall, *C. J.*, in *ex parte* Tobias Watkins, 3 Peters, 193.
Chemung Canal Bank *v.* Judson, 8 N. Y., 254.
Elliott *v.* Piersol *et al.*, 1 Peters, 328, 340.
Ruckman *v.* Coewell, 1 N. Y., 507, and cases cited.
Watson on Sheriffs, 53, 54, 55, 7 vol. Law L.
Tyler *v.* Defrees, 11 Wall., 331.

They cannot again bring the matter into litigation. United States *v.* Nourse, 9 Peters, 8; Voorhees *v.* Bank of the United States, 10 Peters, 449; 4 Cranch, 328–333; McCormack *v.* Sulivant, 10 Wheat., 192.

A judgment *in rem* of a United States Court having jurisdiction of the subject matter is conclusive upon all other courts, and cannot be impeached collaterally.

Gelston *v.* Hoyt, 3 Wheat,, 246.
Williams *v.* Armroyd, 7 Cranch, 423.
Hudson *v.* Guestier, 6 *Id.*, 281.
1 Greenleaf on Ev., § 525 and 543, Red. Ed.
Kelsey *v.* Beers, 16 Abb. Pr., 228.
Chemung Bank *v.* Judson, 8 N. Y., 254.
Ruckman *v.* Coewell, 1 N. Y., 507.
Grignon *v.* Astor, 2 How. (U. S.), 319.
Cocke *v.* Halsey, 16 Peters, 71.

All the world are supposed to be parties to a proceeding *in rem.*

1 Greenleaf on Ev., § 525 and § 543, Red. Ed.
Grignon *v.* Astor, 2 How. (U. S.), 319.

The decree of the U. S. District Court cannot be impeached collaterally on the ground of alleged irregularities in practice.

Thompson *v.* Tolmie, 2 Peters, 157.
Kelsey *v.* Beers, 16 Abb. Pr., 228.
Voorhees *v.* Bank of U. S., 10 Peters, 449.

It will be presumed, in a collateral action, that the proceedings of the U. S. District Court were regular.

The Confiscation Cases, 20 Wall., 92.
McCormack *v.* Sullivant, 10 Wheat., 192.
Ex parte Watkins, 3 Peters, 193.
Ruckman *v.* Coewell, 1 N. Y., 597.
Matson *v.* Burt, 9 Hun, 470.
Chemung Bank *v.* Judson, 8 N. Y., 254.

There remain to be disposed of as objections against the records the twenty-six exceptions offered (fols. 136 to 140) by the defendant in error, and they are answered as follows :

The objection No. 1 of the defendant in error (fol. 135) to the admission of the District Court record is clearly frivolous, inasmuch as the proceedings of that court were pleaded precisely in accordance with the directions of the Code (fols. 60, 63) ; (Code Civil Procedure, § 532 ; Code of Procedure, § 161).

Bement *v.* Wisner, 1 C. R. N. S., 143.
Wheeler *v.* Dakin, 12 How. P. R., 537.
Halstead *v.* Black, 17 Abb., 227.

The objections 2, 3, 4, 5, 6, and 7 and 11 and 13 relate to the jurisdiction or want of jurisdiction, and have already been answered at length.

The objections 8, 9, 10, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 all relate to the manner of proceeding in the District Court and the irregularity of the record ; these are answered in various places in these points, and are met and answered by the points and the various decisions heretofore cited.

Acts of 1861 and 1862 above referred to.
Miller *v.* The United States, 11 Wall., 268.
The Confiscation Cases (Slidell's Lands), 20 Wall., 92.

The act of August 6th, 1861, "to confiscate property used for insurrectionary purposes" extends to all descriptions of property, real or personal, on land or water.

6 Wall., 759 ; *id.*, 756.

The 26th objection is, in fact, the same as the judge submitted in his charge, and has been answered.

In Miller *v*. U. S. (11 Wall, 268), Strong, *J*., in giving the decision of the Court, says at page 303: "It thus appears that in revenue cases, as in admirality, default entered establishes the facts averred in the libel or information as effectively as they can be established on hearing, and warrants a decree of condemnation if the information contains the necessary averments." "The second assignment of error cannot, therefore, be sustained." That was at page 299 as follows: "The second assignment of error is, that there was no such hearing and proof in the case as was necessary to a valid decree of condemnation" (p. 303). "The third assignment is, that as the proceedings related to seizure on land, the case was one of common law jurisdiction, and there should have been a trial by jury," and we are referred to Union Insurance Company *v*. United States, 6 Wallace, 759, and other kindred cases. "But in this cause there was a default." "After default there was no fact to be ascertained." "The province of a jury in suits at common law is to decide issues of fact." "When there are no such issues, there can be nothing for a jury to try." "This assignment is therefore without merit." "None of the cases cited go further than to hold that issues of fact, on the demand of either party, must be tried by jury."

The next question considered and decided was as to the constitutionality of the confiscation acts.

And the court decided that those acts and the proceedings under them were constitutional, and that the acts of 1861 and 1862 were an exercise of the war power—the power of confiscation, and were not mere municipal regulations for the punishment of crime.

Many of the objections offered by the defendant in error to the Confiscation Record were the same as those which had been previously raised and overruled in the confiscation case reported in 20 Wall., 92.

In the Confiscation Case, Slidell's Land, 20 Wall., 92, the head notes are as follows:

1st. Making allegations in libel in the alternative is not fatally defective after default. The proceedings are not criminal.

2d. When an information avers that on a day named a seizure was made by the marshal under written authority given him by the District Attorney in compliance with instructions issued to him by the Attorney-General of the United States, *by virtue of the Act of Congress of July 17th*, 1862; and when, to a citation or monition, founded on the information, default has been made, it will, after such final judgment and condemnation be presumed that the requirements of the statute (which direct apparently that a seizure be made prior to filing the information, and that this seizure be by order of the President of the United States) have been complied with.

3d. When an information, under the said act, filed in the District Court, is really in common law form, and the proceeding has the substance and all the requisites of a common law proceeding, the fact that the information is called a *libel* of information, and that the warrant and citation is called a "monition," does not convert it into a proceeding on the admiralty side of the court.

6th. After default, on proper information, it will be presumed that the property belonged to a person engaged in the rebellion, or one who had given aid and comfort thereto.

7th. The President's proclamation of amnesty, in the year 1868, did not amount to a repeal of the confiscation act.

The points overruled by the court in that case were:

1. The District Court was without jurisdiction.

2. **No property is within the 7th section, unless it has been seized previously to the filing of the information.**

Further, such seizure must be made by order of the President of the United States.

3. The proceedings were on the admiralty instead of the common law side of the court. The proceedings were commenced by a *libel* of information, not by an information. The warrant and citation is called a monition. The witnesses were examined out of court, and greatest of all, the case was tried by the judge without the presence of a jury.

4. There was no service of process.

5. The libel of information was informal. Allegations were in the alternative.

6. The warrant, citation and monition were not signed by the clerk.

7. There was no finding that the property was Slidell's, nor the property of any one liable to the penalty of the confiscation act.

8. The proclamations of 1868 effect a repeal of the confiscation act.

Fourth Point.

The objection to the validity and efficacy of the decree in the District Court of the United States, as a bar to the action of the plaintiff below, and a complete protection to the Phenix Bank against a double payment of the money which it has once paid to the United States under said decree, are threefold.

First.—The objection upon which the learned judge at the

Circuit ruled out this defense, to wit, that the *res* sought to be brought into the jurisdiction of the District Court by seizure, was not so brought in, because the seizure was as *of money deposited*, and not as of *debt for money deposited.*

This objection has received no countenance from the disposition of the case made by the Court of Appeals. It has never claimed any solidity or value, except as a permissible sharpness or refinement, to avoid a forfeiture.

This objection, it is respectfully submitted, has been sufficiently confuted upon two grounds: (1), that the thing seized in the confiscation suit was the liability of the Phenix Bank to the Bank of Georgetown, as a depositary of the latter's money, and that precisely that liability was the sole cause of the action in the present suit of the Bank of Georgetown against the Phenix Bank; and (2), that the very description insisted upon as necessary, to wit, that the seizure and confiscation should have proceeded *eo nomine*, upon the *res* as a relation of debt and credit between the banks, is explicitly expressed in the record.

Second.—The objection is made that the record in the District Court is not conclusive, though the *res* as a debt of, or deposit in, the Phenix Bank was duly seized and within the jurisdiction, because, that *debt* had passed by contract between the Georgetown Bank and Risley, the plaintiff below, to Risley, before the *res* was seized, and subjected to jurisdiction for the condemnation which regularly ensued.

This objection is insisted upon by the Court of Appeals as an adequate answer to the record in the District Court as a bar to Risley's action.

That is to say, although if the Bank of Georgetown were pursuing its original cause of action against the Phenix Bank, the confiscation record would have been a bar to such action, the *res* having been seized and condemned, yet upon that admitted conclusion of law, the record is now no bar because the *res* had not been seized and brought into jurisdiction, *except so far as it still remained the property of the Georgetown Bank.*

But this objection confounds the distinction between the *res*, as a subject of jurisdiction, and the judicial disposition of such *res* accordingly as, upon contestation, the facts concerning it should appear to require this or that decree of the court dealing with the *res*.

The property seized and condemned was a chose in action, to wit, a debt arising from one bank to the other, upon the deposit of the latter's money with the former. The debtor bank, for the purpose of reaching this chose in action as a *res* that was confiscable, was affected by the seizure so as that, thereafter, that debt from it (to whomever due) was in possession of the court, and that possession made its judgment, concerning the *res*, conclusive according to the nature of the *res*. In this case, the *res* being a debt or deposit, by the judgment of the court, it became a debt or deposit to be collected or converted into money and paid into court, for the use of the United States.

Now, the contestation of the plaintiff below, Risley, on this point, was not that this chose in action, was not confiscable as the property of the Bank of Georgetown, but that by title from that bank *he* had acquired an interest which was not confiscable. But, the proof of that and the judgment of the court thereupon was the very matter, which upon claim and answer, could have been litigated by Risley in this suit *in rem*. A judgment in accordance with his contention, would not have been that the *res* was not in court, and the court had no jurisdiction, but that the *res* was in court, and the court having jurisdiction over it, refused to condemn it.

This objection rests entirely upon a confusion of ideas as to what the *res* is, and as to what justifies the condemnation of the *res*.

If the chose in action had been Government securities or railroad bonds deposited with the Phenix Bank by the Bank of Georgetown, this confusion between the possession of the *res* by the court, and its condemnation of the *res* could never have found lodgement in the judicial mind.

The securities would have been, by seizure, in the possession of the court for confiscation. A claimant proving his title, and that in such ownership, they were not confiscable, would have defeated their confiscation.

But the Court of Appeals has sustained this objection wholly upon two decisions of this court relating to the effect of a seizure, under the confiscation acts, of *real estate*. These are the cases of Day *vs.* Micou and of Conrad *vs.* Waples.

These two cases, so far as they are pertinent to the question of what *res* is brought into the jurisdiction of the court by seizure under the Confiscation Acts, have this effect, and no more.

I.—They relate only to seizure under the Act July 17, 1862.

II.—They determine that in respect of a seizure of real estate under that act, the *res* brought into court is measured by the confiscable estate in the land.

III.—That that confiscable estate in the land is, under the Act of 1862, limited to the estate of the life tenant.

IV.—That the confiscable estate, under that act, in case of a mortgage on the land, is only the estate over and above the mortgage.

V.—That while the record of confiscation is conclusive to confiscate the estate in the land which is confiscable, it cannot be maintained as a bar against collateral attack, in respect to the estate of the land not confiscable upon the pretension that the *whole fee* was the *res* brought into court by the seizure of the land.

VI.—This proposition is logical, and is based by the court upon its limitation of the effect of a seizure of land. That is to say, land itself is never severable or movable so that dominion over it is or can be changed by physical transfer. All legal relations to land, ~~and~~ are of *estates in it*, as it is and where it lies, and these estates are all that can

> be sold or devised, or subjected to debt, or judicial sale, or judicial condemnation.
>
> All seizures of land in judicial procedures are of *some person's estate* or interest, and when lands are seized in judicial procedures, only the *estates* that the law can subject to judgment within the jurisdiction invoked, are seized. The *lands* are not brought into court; there is no *pedis possessio* by the sheriff or marshal. The *largest estate* in the land that the judgment can reach is, then, in the contemplation of law, the extent of the preliminary control. *This, then, constitutes the* RES *that is brought into court.*

But these cases are decisive authorities that the measure of the *res* brought into court, by seizure, is the measure of the conclusiveness of the judgment of condemnation disposing of that *res*.

Day *vs.* Micou, 18 Wall., 156.
Conrad *vs.* Waples, 96 U. S., 279.

The recent case of Kirk *vs.* Lynd, 106 U. S., 315, entirely confirms the views above expressed, as to the reach of the *seizure* of land being measured by *the extent of the estate possibly confiscable.*

> The confiscation in that case was under the Act of Aug. 6, 1861. This court held that the whole fee was seized and condemned by the confiscation proceedings in the District Court.
>
> No doubt the *seizure* in this case, so far as physical act or control by the marshal or the court went, was the same as it would have been had the seizure been under the Act of 1862.
>
> But, from the nature of property in land, the *res* brought into court, was in one case a fee, and in the other case a life estate.

But, to overlook the legal principles upon which these cases deal with land as a *res* to be brought into court, and apply them to personal property, securities, debts, and money, ships, arms, and all chattels would be to strike down the fundamental distinction between proceedings *in rem* and *in personam.*

> Confiscations of personal property, sales in admiralty, forfeitures under revenue laws, would be very vain and illusory proceedings if every person claiming a property in the *res* could try over again the issues of rightful condemnation in a collateral suit, although the *res* had been in the possession of the court condemning it, and its decree had been executed by giving a title and possession under it.

Third.—The Court of Appeals also excluded the record in the confiscation suit, on the ground that the debt or deposit being the property of the Bank of Georgetown, it was not confiscable under the Confiscation Acts.

This doctrine is supposed to be justified by a *dictum* in the case of Planters' Bank *vs.* Union Bank, 16 Wallace, 483, to the effect that the property of a *corporation* was not confiscable under the acts.

This objection rests upon considerations which will form the subject of the next Point.

Fifth Point.

The allegations of the information bearing upon the confiscable predicament of this deposit or credit belonging to the Bank of Georgetown require special attention.

First.—The information alleges, in respect to the duly described property proceeded against, as follows:

> "All of which are owned by, and belonging to, and are of the property, estate and effects of the said corporation,

the said Bank of Georgetown, *a corporation composed and organized wholly of rebels, citizens and inhabitants of the United States, who, being the owners of said property, have knowingly used and employed*, and *have consented to the use and employment of the same* in aiding, abetting and promoting the existing insurrection against the United States; and *who, owning property in a loyal State, have assisted and given aid and comfort to the present rebellion against the authority of the United States*," &c.

Rec., fol. 172-3.

The first and second articles of the information in apt terms impute to the said property the use and employment which exposed it to be proceeded against for confiscation, and confiscated under the Act of August 6, 1861.

Rec., fols. 173-175.

The third and fourth articles of the information assign to the property, and its owner in the employment and disposition of the same, the complicity in the promotion of the rebellion, and in the aid and abetting of the same, which exposed the property to be proceeded against for confiscation, and to be confiscated, under the Act of July 17, 1862.

Rec., fols. 176-177.

It will be observed that the information penetrates the corporate form of the ownership, and affixes upon each and every officer and stockholder in the corporation, the rebel character and conduct, in relation to this property, its use and employment, which would make it confiscable, were the ownership, several or collective, in them, as individuals, and not under the artificial contrivance of the fictitious personality of a trading corporation.

These allegations, being duly propounded in the information, are necessarily and conclusively against all the world, maintained by the decree as proved, and so furnishing the basis of the confiscation.

It is manifest, also, that if the collective ownership had been that of part owners, partners or joint stock associates, and the confiscable traits had been alleged and adjudged, which condemned the property under the acts, the *number* of owners would have been an irrelevant and ineffectual plea to save it from condemnation.

It is also obvious, that the *form* of ownership has no natural or necessary significance on the question of military seizure and confiscation, or of judicial seizure and confiscation, *jure belli*, which is but another form for the execution of the power and purpose of the Government to reduce the hostile resources.

It seems absurd to impute to the Confiscation Acts a distinction which should, wittingly, relax the Government grasp upon property, capital, and organized industry and machinery, prepared and used for blockade running, or for the manufacture of gunpowder, rifles or ordnance, *provided*, the property were vested in and employed by a *corporation* of rebels or enemies.

It is also indisputable, that by the general rules of judicial construction, the word person, in relation to property, and especially to the dealing of Government with property, includes corporate ownership, unless in terms, or by some intrinsic incompatibility, corporate ownership is excluded.

Emphatically is this true in the Federal jurisprudence, where even the jurisdictional quality of *citizen* is freely interpreted to include corporations.

Union Ins. Co. *vs.* U. S., 6 Wall., 763. The Union Insurance Company was a corporation in New Orleans, and held a mortgage on the real estate confiscated. The appeal was in respect of this interest, which had been confiscated:

The court says:

"To the extent of the interest created by the mortgage the company may, doubtless, be regarded as owner. But there is no direct proof of consent to the unlawful use; and indeed no proof at all, except the fact of taking the mortgage."

The court disposed of the question wholly on this latter ground, saying: "We do not consider this evidence of consent sufficient to support a forfeiture."

The doctrine of non-confiscability of the property of a corporation is substantially condemned by this decision.

In the celebrated case of the Propagation Society *vs.* New Haven, this court passed upon the question in relation to a question of public law, having a clear analogy with the question here presented. The court say:

"The next question is, was this property protected against forfeiture, for the cause of alienage, or otherwise, by the treaty of peace? This question, as to real estates belonging to British subjects, was finally settled in this court, in the case of *Orr* vs. *Hodgson* (4 Wheaton Rep., 453)."

* * * *

"The counsel for the defendants did not controvert this doctrine, so far as it applies to natural persons; but he contends that the treaty does not, in its terms, embrace corporations existing in England, and that it ought not to be so construed. The words of the 6th article are, 'there shall be no future confiscations made, nor any prosecutions commenced, against any person or persons, for or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty or property,' &c.; the terms in which this article is expressed are general and unqualified, and we are aware of no rule of interpretation applicable to treaties, or to private contracts, which would authorize the court to make exceptions by construction, where the parties to the contract have not thought proper to make them. Where the language of the parties is clear of all ambiguity, there is no room for construction."

* * * *

"Was it meant to be contended that the plaintiffs are not within the protection of this article, because they are not *persons* who could take part in the war, or who can be considered by the court as British subjects? If this were to be admitted, it would seem to follow that a corporation cannot lose its title to real estate upon the ground of alienage, since, in its civil capacity, it cannot be said to be born under the allegiance of any sovereign. But this would be to take a very incorrect view of the subject."

8 Wheat., 489–91.

In *U. S.* vs. *Amedy*, 11 *Wheaton*, 412, Story, *J.*, delivering the opinion, the court say:

"Another question, not raised in the court below, has been argued here, and upon which, as it is vital to the prosecution, we find ourselves called upon to express an opinion. It is that a corporation is not a *person* within the meaning of the Act of Congress. If there had been any settled course of decisions on this subject in criminal cases, we should certainly, in a prosecution of this nature, yield to such a construction of the act. But there is no such course of decisions. The mischief intended to be reached by the statute is the same, whether it respects *private* or *corporate* persons. That corporations are, in law, for civil purposes, deemed persons, is unquestionable. And the citation from 2 Inst., 736, establishes that they are so deemed within the purview of penal statutes. Lord Coke, there, in commenting on the statute of 31 Eliz., ch. 7, respecting the erection of cottages, where the word used is, 'no *person* shall,' &c., says, 'this extends as well to persons *politic* and *incorporate*, as to natural persons whatsoever.'"

* * * * *

"Finding, therefore, no authority at common law, which overthrows the doctrine of Lord Coke, we do not think that we are entitled to engraft any such constructive exception upon the text of the statute."

Thornton vs. *The Bank of Washington*, 3 *Peters, pp.* 39 *and* 42:

Mr. Webster argued that the Maryland Statute of usury, being a criminal law, and passed before the establishment of banks, in the application of its prohibition to "any person," did not include corporations aggregate.

Judge Story, delivering the opinion of the court, says: "Upon the other point suggested in the cause, whether banks are within the statute of usury, we entertain no doubt that they are."

The whole subject of corporate aggregation of individuals, in its production of a *personality*, which must be treated as involving *citizenship*, within the constitutional clauses regulating parties to controversies, relating to property and civil rights, before the Federal Courts, has been fully considered by this court in many familiar cases.

The exclusion of such aggregate corporations from the operation of the Confiscation acts, is wholly at variance with the authority and the reasoning of these cases.

Railway Co. vs. *Whitton*, 13 *Wall.*, 283-5.
Marshall vs. *B. & O. R. R. Co.*, 16 *How.*
Louisville R. R. Co. vs. *Letson*, 2 *How.*, 552-3.

Sixth Point.

The sole support to the proposition of the Court of Appeals that the property of a *corporation is not the possible subject of condemnation*, under the Confiscation Acts, is found by that court in the observations of Mr. Justice Strong, in delivering the opinion of this court, in the case of Planters' Bank *vs.* Union Bank, 16 Wallace, at page 496.

The court decided that the Confiscation Acts excluded any other agents for seizure, or mode of procedure for condemnation, than those named in the acts ; that no authority was given to a military commandant, as such, to effect *any* confiscation. This disposed of the whole case, the subject-matter being whether the compulsory payment by the Union Bank of its debt to the Planters 'Bank to General Banks, as military commandant, was a protection against the suit of the Planters' Bank for the same debt.

After thus disposing of the question in the case, upon this principal and conclusive ground, the opinion proceeds as follows :

"And under neither of the acts was the property of a banking institution made confiscable. Both of them had in view the property of natural persons who were public enemies, of persons who gave aid and comfort to the rebellion, or who held office under the Confederate Government, or under one of the

States composing it. In no one of the six classes of persons whose property was by the Act of 1862, declared subject to confiscation, was an artificial being included."

"Those enactments declaring that private property belonging to certain classes of persons might be confiscated, in the manner particularly described, are themselves expressive of an intent that the rights of conquest should not be exercised against private property, except in the cases mentioned, and in the manner pointed out" p. 496.

This *language* would have shielded the property of blockade-running corporations, (the usual form in which that enterprise was carried on during the war), and saved from confiscation the thousands of bales of cotton for export which they had provided, and the masses of imports they had introduced. The seizures and confiscations of this property, immense as they have been, would have been good or bad, upon the question whether the ownership, &c., was in *natural* persons, or in a corporation of natural persons whose property, as natural persons, would have been confiscable.

It is unnecessary to extend the illustration to other forms of hostile uses of property, by which the rebellion was strengthened and the Government distressed.

So extraordinary a result invites attention to the structure and terms of the acts which are suppsed to produce it.

First.—An examination of the Act of Aug. 6, 1861, it is respectfully submitted, will show that the implication or inference of the court, finds no aliment in the spirit or terms of the act.

Its title is, "An Act to confiscate *property* used for insurrectionary purposes."

Section I. declares "that if" (after the President's Proclamation), "any person, or persons, his, her or their agent, attorney or employee, shall purchase or acquire, sell or give, any property of whatever kind or description, with intent to use or employ the same, or suffer the same to be used or employed, in aiding, abetting or promoting such insurrection or resistance to the laws, or any persons engaged therein; or if any person or persons being the owner or owners of any such property, shall knowingly use and employ, or consent to the use or employment of the same as aforesaid, *all such property is hereby declared to be lawful subject of prize and capture wherever found; and it shall be the duty of the President of the United States to cause the same to be seized, confiscated and condemned.*"

So far as *this* act is concerned, the *power* of the President is not shortened, nor his *duty* relieved by the ownership of the lawful prize being in the *corporation.*

Second.—The title of the Act of July 17, 1862, is, "An Act to suppress insurrection, to punish treason and rebellion, *to seize and confiscate the property of rebels*, and for other purposes."

The fifth section of the act provides:

"That to ensure the speedy termination of the rebellion, it shall be the duty of the President of the United States, *to cause the seizure of all the estate and property, money, stocks, credits and effects of the persons hereinafter named in this section*, and to apply and use the same, and the proceeds thereof, for the support of the army of the United States."

The "persons hereinafter named" are descriptively grouped under six divisions:

The four first divisions exclude corporations by the intrinsic incompatibility of the description with their comprehension.

The *fifth* division might well include as "an agent under the Government," a corporation accepting and discharging an agency such as is alleged in the information.

The *sixth* division in its description "of any person who, owning property in any loyal State or Territory of the

United States, or in the District of Columbia, shall hereafter assist and give aid and comfort to such rebellion," indicates no purpose and no reason for excluding from confiscation the property of a corporation aiding the rebellion, or the property of individuals making up a corporation, and combining their property so as effectively to aid the rebellion.

The argument of intrinsic incompatibility wholly fails. No restriction upon the meaning of the words, "any person," in terms, excludes corporations.

But the *sixth* section of this act provides, "that if *any person* within any State or Territory of the United States, *other than those named as aforesaid*," should pursue a certain course, all his property shall be liable to seizure and it shall be the duty of the President to seize it, and use it or its proceeds as aforesaid, and one of the articles of the information pursues this section in seeking condemnation.

It would seem, therefore, that the implication or inference of Mr. Justice Strong, that the Act of 1862 excluded from condemnation the property of corporations acting to aid the Rebellion by its use, and thereby distress the Government, was not well founded.

The more deliberate examination by the court of the Confiscation Acts, their frame, their purpose, their operation and their service to the Government, has placed the theory and scope of these great measures, in aid of the Government in its course, *jure belli*, for the suppression of the rebellion, upon a secure legal and constitutional basis. The great points are:

First.—That these seizures and confiscations are not deprivations of property in punishment of their owners for personal crime or delinquency. If so, the procedure and trial would have been wholly unconstitutional.

Second.—That they are an exercise of the right of a Government, waging war, to prescribe the conditions, methods and extent, to which property ascribed by the laws and nature of war to the enemy, as part of its strength and resources, shall be seized and condemned.

The seizures and condemnation may be mere acts of force, or they may take such shape and degree of judicial or *quasi* judicial form and vigor as the Government may prescribe. In either case they are parts of the process and power of war.

It is respectfully submitted that under these later adjudications the impression of the *dictum* of Mr. Justice Strong, however well considered loses its apparent force as an authority.

Miller *vs.* U. S., 11 Wall., 292.
Tyler *vs.* Defrees, *Ib.*, 331.
The Confiscation Cases, 20 Wall., 92.
Lynd Kirk *vs.* ~~Tyrrell~~, 106 U. S., 315.
Wallach *vs.* Van Riswick, 92 U. S., 202.

Seventh Point.

But, if we have succeeded in showing that the RES, to wit, the credit or deposit of the Bank of Georgetown with the Phenix Bank, was in the District Court, then, under the pertinent allegations of the information, *the question of law, whether the property of a corporation was or was not confiscable under the acts*, was within the jurisdiction of the court to decide, and it was decided.

This adjudication, can be questioned, collaterally, by the courts of New York, no more than if such adjudication had been one of the Supreme Court of the United States.

Conclusion.

Upon the whole case it appears that the Phenix Bank has been compelled to pay to the United States, under judicial condemnation, its original debt or liability to the Bank of Georgetown.

It further appears that the plaintiff below, Risley, who claimed under the Bank of Georgetown, or by title derived from it, was advised of the confiscation proceedings, and that the subject of his claim was the *res* in those proceedings, at the very inception of them, and had an opportunity to intervene and litigate every question in protection of his right, which he now litigates to defeat the confiscation, collaterally.

It further appears that he preferred the expedient of *impetration* upon executive officers at Washington, to *intervention* in the judicial contestation before the courts, which had been carefully and mercifully provided by the statutes, even when applying the laws of war against property used as a part of the strength of the rebellion.

There is but one explanation of Risley's preference of the indirect and hazardous, and uncertain collateral litigation he has instituted, over the direct, prompt rapid and conclusive contestation which was open to him in the District Court, in the confiscation suit.

That explanation is that the *res,* upon his title and against him, was exposed to confiscation in this proceeding *in rem*, if his relation to the rebellion and to the *res*, brought it and him within the provision of the Confiscation Acts.

Last Point.

The judgment of the Court of Appeals and of the Supreme Court of the State of New York, should be reversed, and a new trial ordered.

Wm. M. Evarts,
Flamen B. Candler,
Of Counsel for plaintiff in Error.

111-125

SUPREME COURT OF THE UNITED STATES.

No. 229.

THE PHENIX BANK OF THE CITY OF NEW YORK,
Plaintiff in Error,
versus
DAVID RISLEY,
Defendant in Error.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

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JOHN EWING RISLEY,
Of Counsel.

Evening Post Job Printing Office, N. Y.

U. S. Supreme Court.

THE PHENIX BANK OF THE
CITY OF NEW YORK,
Plaintiff in Error,

VERSUS

DAVID RISLEY,
Defendant in Error.

In Error to the Court of Appeals of the State of New York.

STATEMENT.

On the 20th day of May, 1861, the plaintiff in error, being then a banking corporation, organized under the laws of the State of New York, and doing business in the City of New York, was indebted unto the Bank of Georgetown, a banking corporation, organized under the laws of the State of South Carolina, and doing business at Georgetown, in the said State of South Carolina, in a sum exceeding ten thousand dollars, such indebtedness being for moneys before that time, in the ordinary course of business, deposited with the said Phenix Bank, by the said Bank of Georgetown (56 to 64).

On the said 20th day of May, the defendant in error, being then a resident of Georgetown, in the State of South Carolina, purchased the said indebtedness of the Bank of Georgetown to the extent of ten thousand dollars thereof, and the said indebtedness was, by a parol agreement, assigned to him (58, 70 to 74).

The defendant in error paid for the said assignment in Southern bank bills, and at the same time the Bank of Georgetown made and delivered to him an order on the Phenix Bank, directing it to pay the said sum of ten thousand dollars (70 to 74).

On the 4th day of January, 1865, the said deposit not having been prior thereto withdrawn, and the said indebtedness still existing on the part of the Phenix Bank, Mr. Risley called at its banking-house, in the City of New York, and notified its cashier that he had purchased the said indebtedness to the extent of ten thousand dollars thereof, and presented the order for the same, and requested that the amount be paid to him (72, 73, 74).

He was thereupon told by the officers of the bank that they recognized the signature of the drawer of the order; that it was good; that the money was there, and that they would pay the amount; but that they preferred to pay it, and would pay it, through some known party (73).

Thereupon, and on the morning of the 5th of January, 1865, the defendant in error caused the order to be presented by a party known to the bank, who was then informed that the money then in its hands belonging to the Bank of Georgetown had been confiscated by the Federal Government, and payment was refused (72 to 75).

The order was thereafter presented through the Chemical Bank of the City of New York, and regularly protested for non-payment (73–74).

The plaintiff in error attempted to justify its refusal to pay the amount in question over to the defendant in error by setting up and showing that on the 5th day of January, 1865, the United States had filed a libel in the District Court of the United States for the Southern District of New York, against the moneys deposited with it by the Bank of Georgetown, and that such proceedings were had upon the said libel as that, on the 24th day of January, of the same year, a decree was made by the said District Court, condemning and forfeiting the said moneys to the use of the United States, for the causes in the said libel mentioned; and that on the 26th day of January the said moneys were actually paid over to and confiscated by the United States as moneys belonging to the Bank of Georgetown, of Georgetown, South Carolina (60 to 61, 64, 67).

The record of proceedings, including the decree of confiscation in the District Court, was excluded by the court below, on the objection of the defendant in error, and the plaintiff in error excepted to such ruling (135 to 140).

At the close of the case for the defendant in error the plaintiff in error moved for a dismissal of the complaint and for a nonsuit on eleven different grounds, which motion was denied, and the plaintiff in error excepted (89 to 91).

The plaintiff in error made several requests to charge the jury, which were refused, and to which refusal he excepted (163 to 166).

The court charged the jury that no cause of action arose upon the holding of the check alone, for the reason that it was not accepted by the plaintiff in error, and that the defendant in error could not recover unless it was found from the evidence that the Bank of Georgetown had assigned to him the indebtedness which arose in its favor upon a deposit of its money with the Phenix Bank (156 to 158, 160, 163 to 166).

The court also charged the jury that if they should find in favor of the defendant in error that they might find interest from the 4th day of January, 1865, provided they found that on that day he notified the plaintiff in error that he held a transfer of the indebtedness, and otherwise they could allow interest only from the date of the commencement of the action (163).

The jury found for the defendant in error, and allowed interest on the amount involved from the 4th day of January, 1865, to the 15th day of January, 1878, the date of the trial, making in all the sum of $19,111.64 (165).

The plaintiff in error moved upon the minutes of the trial to set aside the verdict, and for a new trial, on the ground (1) that the verdict was against the weight of the evidence (2), that it was contrary to the evidence, and (3) that it was contrary to law, which motion was denied, and the plaintiff in error excepted (166, 167).

The case has been twice tried, and on a former trial the complaint was dismissed at circuit, and the judgment entered on that trial was reversed at General Term. The decision of the General Term upon the first trial is reported in Hun's Reports, at page 484.

The General Term wrote no opinion when the case was before it a second time, and the opinion of the Court of Appeals appears in the record (18 to 46), and is reported in the 83 New York Reports, at page 318.

The plaintiff assigns as error:

First.—That the judgment of the State Court was against the exemption and protection claimed by the plaintiff in error, under and by virtue of the seizure and confiscation on behalf of the United States of the moneys deposited with the plaintiff in error and the record mentioned, and against the exemption and protection claimed by the plaintiff in error under and by virtue of the decree of the District Court of the United States, which condemned and forfeited to the United States the said moneys.

Second.—That the judgment of the State Court is against the validity of the authority of the President of the United States, and of the Marshal of the United States, to cause to be made or to make, the seizure of the moneys in question, and against the validity of the seizure, confiscation and condemnation of the same

Third.—That the judgment of the State Court is against the validity of the authority as aforesaid, and against the validity of the said seizure, and of the proceedings, record and decree of the District Court of the United States for the Southern District of New York, as a bar and defense to the action of the defendant in error.

Fourth.—That the State Court excluded as evidence, and as a bar and defense to the action, the said proceedings, record and decree of the said District Court, and against the claim of the plaintiff in error, that the same and the payment thereunder were a complete bar and defense.

Fifth.—That thre was drawn in question the validity of a statute of, or authority exercised under the United States, and the decision of the State Court was against their validity.

Sixth.—That there was drawn in question the construction of a clause of the Constitution or statute of the United States, and the decision of the State Court was against the title, right, privilege or exemption specially set up or claimed under such clause of the Constitution or statute of the United States.

In short, the error alleged is, that the State Court improperly excluded from evidence the record of the District Court, and held that it did not constitute a defense to the action in the State Court.

POINTS.

The Supreme Court has not jurisdiction to review this case, and the Writ of Error should be dismissed.

(1.) It is essential to the jurisdiction of the Supreme Court over the judgment or decree of a State Court that it shall appear from the record that one of the questions mentioned in the statute must have been raised and presented to the State Court; and that the question so raised and presented must have been decided by the State Court against the right claimed or asserted by the plaintiff in error under the Constitution, treaties, laws or authority of the United States; and that such a decision was necessary to the judgment or decree rendered in the State Court.

And it is not enough that it appears from the record that a Federal question arose and was erroneously decided, if it also appears that there was any other matter or issue adjudged by the State Court sufficiently broad to maintain the judgment notwithstanding the error in the decision of the Federal question.

If this be found in any case to be a fact, the Supreme Court will affirm the judgment without any examination of the soundness of the decision of such other matter or issue.

Commercial Banker *vs.* Buckingham, 5 How., 317.
Murdock *vs.* City of Memphis, 20 Wallace, 591.
Mills *vs.* Brown, 16 Peters., 525.

And where the record shows that the State Court might have disposed of the case without deciding any Federal question against the plaintiff in error, the Supreme Court is without jurisdiction.

Ocean Ins. Co. *vs.* Polleys, 13 Peters., 157.

An examination of the record in this case makes it evident that the judgment of the State Court must have been the same as now, even though no Federal question had arisen or been decided.

It was in proof at the trial of the action, and was so found by the jury, that the Bank of Georgetown had assigned to the defendant in error on the 20th day of May, 1861, a portion of its demand against the plaintiff in error, and that notice of such assignment was given on the 4th day of January, 1865.

The assignment of the demand against the plaintiff in error was, therefore, prior to the passage of either of the Confiscation Acts on which the proceedings in the District Court were based, and the notice of such assignment was brought home to it before any proceedings for confiscation had been undertaken (70 to 74, 162, 163, 33).

Hence, it is, that on the 4th day of January, 1865, the plaintiff in error ceased to be the *debtor* of the Bank of Georgetown, and became the *debtor* of the defendant in error under the assignment and notice, and proceedings for confiscation instituted after that date against the credits of the Bank of Georgetown, were wholly ineffectual as against the defendant in error, and the decree of the District Court condemning such credits as belonging to the Bank of Georgetown, took nothing as against the defendant in error.

The proceedings in the District Court were, therefore, immaterial, and were rightfully held so to be, and had they been received in evidence at the trial term the judgment of the State court must have been the same.

(2.) Again, it is the settled law in this State, that the relation of *banker* and *depositor* is that of *debtor and creditor*. Deposits on general account belong to the bank receiving them, and are a part of its *general fund*. The bank becomes a *debtor* to the *depositor* to the amount thereof, and the *debt* can only be discharged by payment to the *depositor*, or pursuant to *his* order.

Chapman *vs.* White, 6 N. Y., 412.
Ætna Nat. Bank *vs.* Fourth Nat. Bank, 46 N. Y., 82.
People *vs.* Mechanics' and T. S. I., 92 N. Y., 7.

So, having no regard for the fact that the confiscation proceedings came *too late* to be available to the plaintiff in error as a defense in this action, it is still apparent that they are *not available*, for the reason that the Government did not proceed against *credits* of the Bank of Georgetown, but against *specific moneys* belonging to it on deposit with the Phenix Bank.

Money was libelled, money was seized, money was condemned, money was paid over in satisfaction of the decree of forfeiture.

If, therefore, the point is conceded that the *legal relation* which existed between the plaintiff in error and the Bank of Georgetown on the day of the filing of the libel by the Government, growing out of the fact that the one had prior thereto deposited moneys with the other in the ordinary course of business, was that of *debtor* and *creditor*, then it follows that *that relation* was not disturbed by the proceeding in the District Court, which was not directed against the *credits* of the Bank of Georgetown, but against a *specific fifteen thousand dollars, more or less, belonging to the Bank of Georgetown, then on deposit in the Phœnix Bank* (168 to 196). For there is no pretense that the *moneys* libelled, conthe judgment notwithstanding the error in the decision of the Federal question.

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The payment over, under the decree of forfeiture, of the *specific moneys* libelled and condemned, did not discharge the *debt* due from the Phœnix Bank to the Bank of Georgetown for *moneys deposited on general account* prior to the 20th day of May, 1861.

That debt was due *after* the forfeiture, and is *still* due.

For this reason also it is apparent that the proceedings in the District Court for confiscation were wholly immaterial, and the judgment of the State Court must have been the same had those proceedings been admitted in evidence.

(3.) And yet, again, the assurance on the part of the plaintiff in error, when the check was presented for payment, *that the drawer's signature was correct; that it still held the funds; that the check was good and would be paid*, rendered it liable for the amount.

This is not claimed on the ground that what was said was an *acceptance* of the check; nor that an *acceptance* can be by *parol*, but on the ground that what was answered to the defendant in error when the check was presented amounted to a *certification*, and that the *certifying bank* is as firmly bound to the holder of the check as it would be upon a contract of *acceptance* of a bill of exchange.

It has been frequently held by the courts of New York State and the Federal courts, that "*the import of the certification of a check by a bank is a statement that the bank holds sufficient funds of the drawer applicable to its payment*, and "*an agreement that it will retain those funds and pay the check when presented.*"

Farmers and Mechanics' Bank *vs.* Butchers and Drovers' Bank, 16 N. Y., 125.
Cooke *vs.* State National Bank, 52 N. Y., 96.
Marine Nat. Bank *vs.* Nat. City Bank, 59 N. Y., 67.
Merchants' Bank *vs.* State Nat. Bank, 10 Wall., 604.

And that the *certification* of a bank check is equivalent in law to the *acceptance* of a bill of exchange.

> Farmers and Mechanics' Bank *vs.* Butchers and Drovers' Bank, 16 N. Y., 125.
> Barnes *vs.* Ontario Bank, 19 N. Y., 152, 159.
> Meads *vs.* Merchants' Bank, 25 N. Y., 143.
> Irving Bank *vs.* Wetherald, 36 N. Y., 335.
> Merchants' Bank *vs.* State Nat. Bank, 10 Wall., 604.
> Barnet *vs.* Smith, 10 Foster (N. H.), 256.

And that a bank on which a check is drawn may *legally certify* such check without the employment of any *written words*.

> Irving Bank *vs.* Wetherald, 63 N. Y., 335.
> Marine Nat. Bank *vs.* Nat. City Bank, 59 N. Y., 67.
> Epsey *vs.* Bank of Cincinnati, 18 Wall., 604.
> Barnett *vs.* Smith, 10 Foster (N. H.), 256.

In this view of the case the plaintiff in error became liable to the defendant, as upon the certification of a bank check prior to the day on which the confiscation proceedings were commenced, and the rights of the parties as thus fixed were not affected by the proceedings for forfeiture subsequently taken, and they did not and could not control the decision of the State Court.

II.

The State Court committed no error in excluding from the case the record of the proceedings which were taken for forfeiture in the District Court; because,

Those proceedings were *absolutely void*, from the filing of the lible of information to the entry of the final decree of distribution, *for want of authority in the court wherein they were had to entertain the same.*

Three legal propositions, which may be regarded as established by the weight of judicial determination must be kept in view in considering the character and effect of the proceedings which were had in the District Court for confiscation, viz.:

First.—The right of the Government of the United States to confiscate an enemy's property *on land* is derived wholly from the *Acts of Congress,* and does not exist by the *law of nations.*

U. S. *vs.* Shares of Stock, 5 Blatch., 201.
Brown *vs.* U. S., 8 Cranch, 110.
Planters' Bank *vs.* Union Bank, 16 Wall., 496.

Second.—The Confiscation Acts of Congress are highly *penal* in their character; and it is a settled rule in the courts of this State, and in the Federal Courts, that penal statutes are to be construed strictly, and not extended by *implication or intendment.*

Bell *vs.* Dole, 11 Johns., 172.
Story *vs.* Stebbins, 5 Cowen, 210.
Myers *vs.* Foster, 6 Cowen, 567.
Andrews *vs.* U. S., 2 Story (C. C.), 202.
Ferrett *vs.* Atwill, 1 Blatch., 151.
U. S. *vs.* 1412 Gall. Spts., 10 Blatch., 428.
U. S. *vs.* Morris, 2 Bond, 23.
U. S. *vs.* Clayton, 2 Dillon, 219.
U. S. *vs.* Huckabee, 16 Wall., 431.

Third.—Though the case may be within the *mischief* intended to be remedied by a penal enactment, that fact furnishes no reason for construing the statute so as to include cases not within the correct and ordinary meaning of the language employed in the act.

U. S. v*s*. Sheldon, 2 Wheaton, 119.
U. S. v*s*. Wiltberger, 5 Wheaton, 76.
U. S. v*s*. Ragsdale, 1 Hempstead, 497.

It is important, then, in the outset, to examine briefly the Acts of Congress under which it is claimed the proceedings for confiscation were had, and on which alone the right, in any case to confiscate property *on land* is founded.

Those enactments are two in number, and are as follows, viz.:

(*a.*) *An act to confiscate property used for insurrectionary purposes, approved August* 6, 1861. (12 Statutes at Large, 319.)

(*b.*) *An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes, approved July* 17, 1862. (12 Statutes at Large, 589.)

The Act of August 6, 1861, provides:

Section 1. "That during the then present or any future in-"surrection against the Government, after the President shall "have declared by proclamation that the laws are opposed " * * * * if any *person* or *persons, his, her, or* "*their agent, attorney or employee,* shall purchase or acquire, "sell or give, any property of whatever kind or description, "with intent to use or employ the same, or suffer the same "to be used or employed in aiding, abetting or promoting "such insurrection or resistance to the laws; or if any *per-*"*son or persons,* being the owner or owners of any such prop-"erty, shall knowingly use or employ, or consent to the use "or employment of the same as aforesaid, all such property "is hereby declared to be lawful subject of prize and cap-"ture, wherever found; and it shall be the duty of the "President of the United States to cause the same to be "seized, and confiscated and condemned."

Section. 2. Confines the proceedings for condemnation to the District or Civil Court of the United States having jurisdiction of the amount, or in admirality, in any district in which the same may be seized.

The Act of July 17, 1862, in *Section* 1 provides that if *any person* shall, after the pasages thereof, commit the crime of treason, and being adjudged guilty thereof, he shall suffer death.

Section 2 declares the punishment for *any person* who shall set on foot or incite rebellion against the authority of the United States.

Section 3 disqualifies and disfranchises *persons* guilty of either of the above named offences.

Section 4 declares that the act shall not affect or alter the punishment for treason committed before the passage of the same.

Section 5 makes it the duty of the President to seize the estates and property of the following classes of persons, viz.:

(1.) Any *person* thereafter acting as an officer of the rebel army or navy.

(2.) Any *person* thereafter acting as President, Vice-President, Member of Congress, Cabinet Officer, Foreign Minister, Consul or Judge of the so-called Confederate States.

(3.) Any *person* acting as a member of any State Legislature or Government of any of the Confederate States.

(4.) Any *person* having held office under the Government of the United States who shall accept office under the Government of the rebellious States.

(5.) Any *person* who should thereafter hold any office under the Government of the so-called Confederate States, or under the Government of any of the States thereof, provided they shall have accepted the same after the date of the ordinance of secession of the State in which such person shall hold his office.

(6.) Any *person* owning property in any loyal State who shall thereafter assist and give comfort and aid to the rebellion.

Section 6 declares that any *person* in the rebellious States who, *after* the passage of the act, being engaged in rebellion, or aiding and abetting such rebellion, should not, within sixty days after public warning and proclamation made by the President, cease to aid such rebellion and return to his allegiance, "all the estate and property, moneys, stocks and credits of such person shall be liable to seizure, as aforesaid, and it shall be the duty of the President to seize and use them as aforesaid or the proceeds thereof."

Section 7 provides the method of condemnation, and declares that they shall be *in rem*, "and conform as nearly as may be to proceedings in admiralty," and that if the property "shall be found to belong to a *person* engaged in rebellion, or to *one* who has given aid and comfort thereto, it shall be condemned as enemies' property."

On the same day Congress passed a joint resolution declaring that the act should not be so construed as to apply to any act or acts done prior to the passage thereof. (12 Statutes at Large, 627.)

These are all the provisions of law giving *authority*, or any *color of authority*, to the record of confiscation, which was offered in evidence and excluded; and they do not authorize *any proceeding* against the Bank of Georgetown, or *other corporations*, for the confiscation of any property *held, owned or used by it or them*.

The confiscation acts do not, nor do either of the proclamations of the President mentioned in the libel of information (12 Statutes at Large, 1258–1266), use or employ the term *corporation*, *company*, *association* or other designation, to denote an *artificial person*, but they all abound with the terms "*person or persons*," and "*he or she*," and the phrases "*any person who shall commit*," and "*the property of any such person*."

The acts are silent with reference to the conduct of the corporation having its *situs* inthe then rebellious States, and none of the penalties prescribed by the confiscation laws could be visited upon the Bank of Georgetown, unless the term *person*, as used in these statutes, includes or is applicable to corporate bodies.

The term *person*, as used in these acts, has not been made to include *corporations*, nor to be applicable thereto by any Federal law; and the statutes, being *penal* enactments, the rule of construction, as we have seen, is in such a case, against any enlargement by *implication or intendment.*

But, aside from the fact that the language of the enactments does not include *artificial persons*, and aside from the fact that the rule of legal construction is against an enlargement of that language by implication, the inference is, from the *object* and *scope* of the legislation itself, that corporations, as such, were not comprehended in either of the confiscation acts, in the term *person.*

The acts are *prohibitory* in their character, and *create and define* a class of crimes, and provide punishments therefor, which were before unknown to the law. But it could not have been the intention of the law-making power to visit these punishments upon corporations; because a corporation, as such, could not be guilty of *treason*, nor could it, treated as a *person*, be guilty of a commission of *any of the wrongs* which the confiscation acts denounce.

For instance, if the stockholders or directors of a corporation should resolve to burn a dwelling house, and that resolution should be actually carried into effect, *the corporate body, as an artificial person*, could not be *tried and punished for arson*, but each individual stockholder or director could be.

So, too, if the *directors* of the Bank of Georgetown had, by resolution or otherwise, compelled all of its officers to enter the insurrectionary army, the *corporation itself* could not have been *tried* and *punished* for that act, but the *individual directors* thus compelling and the *individual officers*, so entering the army, could be.

That is to say: the bank could not be *tried, sentenced and executed* for the crime of treason, in the language of the Act of July 17, 1862, but each *individual member* of the corporate body might be so *tried, sentenced and executed.*

Again, the stockholders or directors of the bank might devote, by resolution or otherwise, a portion of the property under their control to the aid of the rebellion, and such an overt act on their part would, in the langurge of the Act of August 6, 1861, render the property of *each person* so "*aiding and abetting*," liable to *seizure and forfeiture*, but woud it render property in which they had no *individual interest or ownership*, and which belonged to the corporate body, also liable to *seizure and forfeiture?*

It may, therefore, *on principle*, be asserted, that it never was the *intention* of Congress to declare the forfeiture of the property of a corporation, or the property held by it, because of the acts of the persons interested in such corporation, nor because of the individual conduct of a portion or the whole of its officers; and hence the term *person*, as used in the Confiscation Enactments, *was not intended* to embrace corporate bodies.

But there is ground for saying that the question has been put at rest by an authoritative suggestion from our highest Federal Court.

In the case of the *Planters' Bank* v. *Union Bank* (16 Wallace, 496), in considering the scope and application of the Acts of August 6, 1861, and July 17, 1862, the Supreme Court said:

> "*No others authorized the confiscation of private property,*
> "*and they prescribed the manner in which alone confiscation*
> "*could be made.*
>
> "*The system devised was necessarily exclusive, and under*
> "*neither of the acts was the property of a banking institution*
> "*made confiscable.*
>
> "Both of them had in view the property of *natural persons*,
> "who were public enemies; of *persons* who gave aid and
> "comfort to the rebellion or who held office under the Con-
> "federate Government or under one of the States compos-
> "the same. *In no one of the six classes of persons whose pro-*
> "*perty was, by the Act of* 1862, *declared subject to confiscation,*
> "*was an artificial person included.*"

Thus it is made to appear, that the decree against the property of the Bank of Georgetown, which was offered in evidence in the court below, was not supported, and was not made possible, by any law, *civil, common, or statute.*

Now, it is said by Mr. Benedict, in his elementary work on Admiralty (page 9, Sec. 13), on the subject of jurisdiction, and on the strength of the case which is reported as the *State of Rhode Island* vs. *State of Massachusetts* (12 Peters, 718), "*that the action of a court is either judicial or extra-" judicial.*

" *If the law confers the power to render a judgment or decree " in a case, then the court has jurisdiction, and its action is " judicial; if, however, the law does not confer such power, then " the court is without jurisdiction, and its action is extra-" judicial.*"

In the case cited (12 Peters., 718), the Supreme Court defined jurisdiction to be, " *the power to hear and determine " the subject matter in controversy between parties to a suit; to " adjudicate or exercise any judicial power over them.*"

It is also there said that " *the action of a court of limited " jurisdicton must be confined to the particular cases, controversy, " and parties over which the Constitution and laws have author-" ized it to act:* any proceeding without the limits prescribed " is *coram non judice,* and its action a nullity; and whether " the want or excess of power is objected to by a party, or " is apparent to the court, *it must sur-cease* its action or pro-" ceed *extra judicially.*"

So, also, in *Windsor* vs. *McVeigh* (93 U. S. [3 Otto], 274), it is said that the *jurisdiction* of a court to pronounce a judgment or decree does not transcend *the law* which is applicable thereto.

If, therefore, there was no law to warrant the Government in proceeding against the Bank of Georgetown for the sequestration of its property, then there is no law to uphold the decree which was pronounced for that purpose.

If the proceeding was *without jurisdiction* in the beginning, it is *without jurisdiction* in the end.

If the decree of the District Court had no life or force when made, it had none when offered in evidence; and if it was *a nullity* then, it is *void* now, and is entitled to no respect in any court.

It avails nothing to say that the State Court could not inquire into the right of the District Court to pronounce the decree which was offered in evidence, for it was settled as far back as the case of the *Chemung Canal Bank* vs. *Judson* (8 N. Y., 454), where the record offered was, as here, a decree of the District Court, "that the jurisdiction of any "court, exercising authority over a subject, may be inquired into in every other court, where the proceedings "of the former are relied on and brought before the latter "by any one claiming the benefit thereof."

And in *Thompson* vs. *Whitman* (18 Wallace, 457); that want of jurisdiction, if it exists, may always be shown, either as to the subject matter, or the person, or in proceedings *in rem*, as to the thing.

The reason of it is, as was stated in *Adkins* vs. *Brown* (3 Cowen, 206), and many other cases, that judgments *without jurisdiction* are void; and void judgments and decisions, it is said in *People* vs. *Egleston* (13 How. Pr., 123) are *as no judgments and decisions* as to any party who sees fit to so consider them.

Nor does it avail anything to say that because the District Court was the tribunal in which the proceedings for confiscation must be had, if had at all, its jurisdiction to entertain such a proceeding in a particular case cannot be questioned, *except it be done in that court and in each case as it arises;* for that would be saying that a court exercising a *limited statutory power*, may usurp a jurisdiction over subjects and suitors *not committed* to it, because it has jurisdiction over such as *were* included in the statutory grant of power.

Or, in other words, it is saying, *that the court may proceed wrongfully because it has the right to proceed at all.*

The case on this point stands thus: The District Court could entertain proceedings for confiscation in all cases where such proceedings might be *lawfully commenced and carried on*, but such proceedings against the property of the Bank of Georgetown, *were not lawfully possible*, and hence the District Court proceeded in that behalf *without* jurisdiction.

The principle involved is the same as would arise should a court, having exclusive *admiralty jurisdiction*, proceed to final decree on a libel filed to foreclose a mortgage on real property; or as would arise, should a Surrogate's Court enter final judgment on a bill filed to dissolve the marriage relation, or a complaint to foreclose mechanic's lien.

In either case the judgment of the court would be void for *want of power in the tribunal to take any steps for such a purpose.*

For a like reason, the decree of the District Court, condemning and confiscating the property of the Bank of Georgetown was void.

III.

The Record was properly excluded, for the reason that the proceedings in the District Court for confiscation were fatally defective and irregular, and that the court did not have or acquire jurdisdiction to pronounce a valid decree forfeiting the property of the Bank of Georgetown, and this is so notwithstanding such property may have been the lawful subject of confiscation.

(1.) The libel of information on which all subsequent proceedings in the District Court depended, was so *deficient in form,* that no valid decree of forfeiture could be predicated thereon (172 to 180).

It was *fatally informal* in not charging that the causes of the forfeiture were "*contrary to the form of the statute or statutes of the United States in such cases provided,*" as required by the 22d Admiralty and Prize Rule of the Supreme Court (Phillips' Practice, 386).

In the case of *Huckabee* vs. *U. S.* (16 Wallace, 431), in passing upon the sufficiency of an amended information, filed under the confiscation acts, from which the averment in question was omitted, the court said: "Information of the "kind should propound in distinct articles the causes of "forfeiture, *and should aver that the same are contrary to the "form of the statute in such case made and provided;* and the "rule is, that inasmuch as the information is in the nature

" of a *criminal proceeding*, the allegations must conform " *strictly to the statute* upon which it is founded, which is " sufficient to show that the theory of the amended information cannot be sustained."

The court cited the following cases in support of its ruling:

The *Hoppet*, 7 Cranch, 389.
The *Caroline*, 7 Cranch, 500.
The *Charles*, 1 Brockenborough, 347.
The *Mary Ann*, 8 Wheaton, 380.
2 Parsons on Maritime Law, 681.

(2.) The proceedings in the District Court were upon a *libel of information and monition;* they should have been by *information, warrant and citation;* the decree contained in the record is, therefore, void.

The property sought to be forfeited was *on land*, and in such a case the proceedings should have been as nearly as possible like those employed in revenue cases; whereas the government did proceed on the *instance side* of the court strictly, as in admiralty cases.

The District Court could proceed against property *on land* for confiscation only on the common law side *in rem*, while the record offered shows a strict admiralty proceeding *in rem*, from the filing of the libel to the final decree of the distribution.

The *Sarah*, 8 Wheaton, 39.
Union Ins. Co. *vs.* U. S., 6 Wallace, 759.
Armstrong's Foundry, *Ibid.*, 766.
T. S. *vs.* Hart, *Ibid.*, 770.
Confiscation Cases, 7 Wallace, 462.
Morris Cotton, 8 Wallace, 511.
Ex parte Graham, 10 Wallace, 541.
U. S. *vs.* Winchester, 99 U. S., 372.

In the *confiscation cases* (20 Wallace, 109–10) the rule is again asserted that, in the case of seizures *on land*, resort should be had to the *common law* side of the court; but in that case the proceeding was upheld mainly on the ground that because a *citation* was issued, as well as a *monition*, the record contained all the *essential requisites* of a *common law proceeding,* and that judgment having gone in the court below *by default* informalities could not be availed of on *writ of error* to that court.

But it is otherwise with the case at bar. The record here offered does not show that any *citation* ever issued from the District Court; wherefore it is that the action was not commenced on the *common law side* of the court; and the Bank of Georgetown was not, nor was the defendant in error, nor was any other corporation or person, ever lawfully *cited to appear and defend.*

Jurisdiction was not, therefore, at any time acquired by the District Court to pronounce *a valid decree condemning property on land.*

(3.) The decree of the District Court offered was without jurisdiction, for the reason that the record of which it forms a part does not show an *Executive seizure,* or a seizure by *Executive authority,* prior to the commencement of the proceedings for condemnation.

Section 6 of the Act of July 17, 1862, makes it the duty of the President to *seize* the property of the several classes of persons named in the act.

Section 7 provides a mode of procedure for condemnation and says: That to secure the condemnation and sale of any such property *after the same shall have been seized,* so that it may be "available for the purpose aforesaid, proceedings *in* ' *rem* shall be instituted."

It is very clear from the language of the act, that before the District Court could proceed at all for the forfeiture of property *on land,* it was necessary that there should have been a seizure by *Executive authority* of the property in question.

The President is, by the terms of the act, *commanded to make a seizure* of the property, and "*after*" such seizure, and to the end that the property may be made "*available*" proceedings *in rem* are to be instituted.

Clearly the right of the court to proceed did not exist, and would not in any similar case, *until after a seizure had been made.*

The Supreme Court has, in fact, so held in the confiscation cases (20 Wallace, 107–8) where it said: "Undoubt- " edly though not an inferior court, the District Court is " one of limited jurisdiction, and that it has jurisdiction of " the particular case which it attempts to adjudicate must " appear. Undoubtedly, also, *only such property as has been " seized by Executive order is within the power of that court for " confiscation proceedings. Thus much is conceded.*"

This language was used by the Supreme Court in holding that a seizure prior to any proceedings in the District Court, which was made by the Marshal upon the written direction of the Attorney-General, was *equivalent to a seizure by the President.*

The fact was that, in the case cited (as is seen at page 96). the information was filed against the property on the 15th *day of September*, 1863, and one of the averments thereof was, that the property had been seized by the Marshal *on the* 15*th day of August*, 1863, "under the instructions of the " Attorney-General, by virtue of the Act of Congress of " July 17, 1862."

In a more recent case the question has been squarely passed upon by the Supreme Court.

In *United States* vs. *Winchester* (99 U. S., 372), it is said:

The order of the President for the seizure, under the Act of July, 17, 1862, *of the property of persons engaged in armed rebellion against the United States or in aiding and abetting the rebellion, is a prerequisite to the exercise by the District Court of its jurisdiction to adjudge the forfeiture and decree the condemnation of such property.*

The record, which was offered in evidence in the case at bar, shows no such prior seizure of the property.

The seizure recited in the libel of information is the very seizure which was directed in the monition which was issued after the information had been filed.

The truth of it is, that the *proceedings in rem were instituted not* "*after*," but *before* any seizure whatever had been made and consequently *the Court had no jurisdiction to decree a forfeiture.*

(4.) The decree offered in evidence was irregular, for the reason that the record, of which it formed a part, did not show that the District Court *proceeded to hear and determine* the cause *ex parte*, and adjudged therein according to law, after the default, as required by the 89th Section of the Act of March 2, 1799 (1 Stat. at Large 696), and the 29th Admiralty Rule of the Supreme Court.

In the *U. S.* vs. *The Lion* (1 Sprague, 400), it was held —under the law and the rule cited—that the Court was bound to cause the allegations of the Libel to be proved, *even upon a default*, before any decree of forfeiture could pass. The decree in the record offered in evidence contains no recitals indicating that the cause was tried *ex parte*, nor that any proofs of the averments in the libel of information *were exacted*, nor even that the libel was taken *pro confesso*, as required by the 29th Admiralty Rule.

(5.) The decree of the District Court, was without juristion, for the reason that the record does not show that the marshal, after attaching the moneys in question, "*caused public notice thereof, and of the time assigned for the return of* "*such process and the hearing of the cause to be given*" in some newspaper published in the district, as required, by the 9th Admiralty Rule of the Supreme Court. Service of the monition was not complete until such notice by publication had been given, and no decree would be valid or binding on any one, if entered before proof of such publication had been furnished.

(6.) The decree of the District Court is invalid, for the reason that the record, as a whole, shows that the Court did not have, and had not had possession of the *rem*, the *money* in question, at the time of pronouncing a judgment of forfeiture.

The monition directed the marshal to attach "*fifteen thou*-" *sand dollars, more or less, and to detain the same in your* (his) "*custody, until the further order of the court respecting the same*" (179 to 181). The next order given to the marshal by the court, concerning the fund, was on the 24th day of January, 1865, when the writ of *venditioni exponas* was placed in his hands, in which he was commanded to *sell* the said moneys, *after giving fifteen days' notice thereof*, and to make return under the writ on the 14th day of February following (182 to 183).

On the 26th day of January, two days after receiving the *venditioni exponas*, the marshal returned, not that he had *sold* the property attached, but that he had *collected twelve thousand one hundred and seventeen and* $\frac{38}{100}$ *dollars from the Phenix Bank* (189).

Thus it is shown from the record itself, that the return which the marshal made to the monition *that he had attached the moneys*, was false; and that the *rem* was not in the custody of the court when the decree of forfeiture was pronounced.

So, too, it was shown *aliunde*, before the record was offered in evidence, that the return of the marshal, that he had attached moneys belonging to the Bank of Georgetown was false, and that no such attachment had, in fact, been made (100, 101), and it is now well settled that the record of a foreign judgment may be contradicted in a collateral proceeding, as to the jurisdictional facts recited therein, and if it be shown that such facts did not exist, the record would be a nullity.

Thompson *vs.* Whitman, 18 Wal., 457.

The specific sum of money proceeded against was *tangible, personal property*, and such property can be attached only by the officer's taking it into his actual custody, and no such thing was done by the marshal, as is shown from the record itself, and the evidence which preceded it.

Haggerty *vs.* Wilber, 16 Johns., 287.
Goll *vs.* Hinton, 8 Abbott, 120.
Smith *vs.* Orser, 42 N. Y., 132.
United States *vs.* Graff, 4 Hun, 634.

Where the proceeding is *in personam*, personal service of the process gives jurisdiction of the person; and where the proceeding is *in rem*, actual possession of the the thing proceeded against gives jurisdiction of the subject matter, *and the court may then pronounce judgment aud not before.*

IV.

The record of the proceedings in the District Court was properly excluded, on the ground that it was wholly irrelevant and immaterial; because.

(1.) As we have already shown, it is the settled law in the State of New York, that the relation subsisting between *banker* and *depositor*, is that of *debtor* and *creditor*.

In other words, when the proceedings were set on foot in the District Court, the Phenix Bank was liable to the Bank of Georgetown or its assigns, on a simple debt arising on contract, a mere *chose in action*.

The relation of *bailor* and *bailee* did not exist between the banks, and the Phenix Bank had no *specific sum* of money in its hands, which the Bank of Georgetown might demand and recover *in kind*.

Nevertheless, the libel in the District Court was filed against *specific moneys*, and the decree condemned *specific moneys*.

It will be conceded, that a decree *in rem* reaches nothing but the identical *thing* against which the original process runs.

We also concede that *credits*, *stocks* and other *evidences of debt*, are attached in admiralty and revenue cases, as was held in *Miller* vs. *United States* (11 Wallace, 268), by the service of a *notice*; but, to the end that *credits* may be attached by *notice*, it is necessary that the process should run against *credits*, and that the *notice* should point out *credits*.

Our contention is that a process against *specific moneys* is not a process against *credits*, and that a notice to the garnishee, that *specific moneys* in his hands are attached, does not operate as an attachment of *credits*, also in his hands.

It is absurd to say that because credits *may be* attached by the mere service of notice, *they are* attached by the service of a notice which makes no mention of *credits*.

A glance at the record offered in evidence shows the *libel* did not, nor did the *monition*, nor did the marshal's *return*, nor did the *decree* of forfeiture, nor did the writ of *Venditioni*

Exponas, nor did the *order for distrbiution,* run against the *debt* due to the Bank of Georgetown from the Phenix Bank, and consequently the same is not affected thereby.

Burbank *vs.* Semmes, 99 U. S., 138.

The action at bar is prosecuted to recover *that debt* while the action in the District Court was prosecuted to condemn a *special deposit,* or a *particular sum of money, in kind.*

Both actions might be maintained, and a final decree in the one would not bar a recovery in the other, for the reason that the *causes of action* were not identical, the one being the right to recover the *debt due,* the other being the right to condemn the *deposit in kind.*

It might well be that the Phenix Bank was not only liable to the Bank of Georgetown on *general account,* but also for a *deposit in kind.*

Thus it is that the record offered in evidence was not *relevant* to the issue involved in this action.

(2.) The proceedings for confiscation in the District Court came *too late* to be available as against the plaintiff.

The confiscation acts applied only to the property of persons who might, *after* their passage, be guilty of the acts which they denounced, and reached only the estate of the *actual owner* at the time the property was seized, and nothing done by the owner of the property *before* the passage of the acts affected his *title or pover of disposition.*

Conrad *vs.* Waples, 96 U. S. (6 Otto), 279.

Now the causes of forfeiture which are alleged in the libel of information are acts done by the bank *subsequently* to the passage of the first confiscation act, on August 6, 1861.

But, as we have already shown, the Bank of Georgetown had divested itself of *title to the debt* due from the Phenix Bank prior to the passage of the earlier confiscation act by an *assignment* made to the plaintiffs on the 20th day of May, 1861, of which notice was given on the 4th of January, 1865, which was prior to the date of actual seizure.

Thus, on the strength of the case last cited, the decree of confiscation took nothing, for the reason that the Bank of Georgetown was not *the owner of the deposit* at any time after confiscation had become possible.

And thus it is that the record offered in evidence, showing a confiscation against the property of the Bank of Georgetown, was wholly *immaterial* to the issue involved in this action.

V.

The case for the defendant in error is briefly restated thus:

(1.) The rulings of the State court upon the admission of evidence and other matters not involving the Federal question, even though erroneous, are not reviewable in the Supreme Court.

(2.) The disposition of the case by the State Court did not necessarily involve the decision of any Federal question, and its judgment, despite such question, must have been the same.

(3.) The Federal question, if any arose, was rightly decided by the State Court.

The writ of error, therefore, should be dismissed for want of jurisdiction, or the judgment affirmed upon the merits of the case.

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Of Counsel.

111-125

SUPREME COURT OF THE UNITED STATES.

No. 229.

THE PHENIX BANK OF THE CITY OF NEW YORK,
Plaintiff in Error,
against
DAVID RISLEY,
Defendant in Error.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

BEEBE, WILCOX & HOBBS,
Attorneys for Defendant in Error.

FRANKLIN A. WILCOX,
Of Counsel.

Evening Post Job Printing Office, N. Y.

U. S. Supreme Court.

THE PHENIX BANK OF THE
CITY OF NEW YORK,
Plaintiff in Error,

VERSUS

DAVID RISLEY,
Defendant in Error.

Supplemental Brief for Defendant in Error.

POINTS.

I.

If the case could have been decided by the New York Court of Appeals without considering the Federal question, or if considering that question, it was not the *controlling* question, the judgment will be affirmed.

Murdock *vs.* The City of Memphis, 20 Wall., 591.

Citizens' Bank *vs.* Board of Liquidation, 98 U. S. Reports (8 Otto), p. 140:

where the court holds that "to give us jurisdiction un-"der section 709 Revised Statutes, it is not only necessary

" that some one of the questions should exist on the record, " *but that the decision was controlling in the disposition of the* " *cause.*"

The Court of Appeals (see Opinion, fol. 19) affirmed the court below in the ruling that the plaintiff was " entitled to " recover on the third cause of action, which alleged an assignment of $10,000 of the debt owing by the defendant " to the Bank of Georgetown, made on the 20th day of " May, 1861, the day on which the check was dated and delivered to the plaintiff, if the jury should find that concurrently with the giving of the check, there was an oral agreement for a valuable consideration made between the Bank " of Georgetown and the plaintiff to assign to the latter " $10,000 of its debt against the Phenix Bank."

In this ruling the Court of Appeals found no error (fol. 46).

The General Term had disposed of the case entirely on this point. (See Opinion, fols. 198-202.)

This was the only question of law and fact at the Trial Term. The complaint alleged the assignment, and the answer denied it. The plaintiff on the trial before the jury swore to it, and the defendant endeavored to disprove it. The jury found on this question in favor of the plaintiff.(the defendant in error). And so we submit that the court will not consider any points of the plaintiff in error here, bearing on this question of fact. Nor will it consider the ruling of the Court of Appeals, that the assignment was good in law on May 20, 1861, and before the passing of the confiscation acts, notice of which assignment (if any were necessary the Court of Appeals adds) the bank had before any proceedings in the United States District Court of Condemnation, with respect to the property of the Bank of Georgetown. On the assignment, the Court of Appeals found that the Phenix Bank ceased to be the debtor of the Bank of Georgetown, and it had then became the debtor of Risely, the defendant in error. The Court of Appeals went further than the

General Term, but not necessarily so—they might have stopped, having decided that the assignment was valid, for, it is apparent that if at the time of the commencement of the confiscation proceedings against the Bank of Georgetown, the Phenix Bank was not the debtor of the Bank of Georgetown, but on the contrary, the debtor of the defendant in error, then the fact of whether or not such proceedings had been taken and a decree entered therein became entirely immaterial, and the proof offered in respect thereto was clearly inadmissible.

On the 4th day of January, 1865, the Phenix Bank had been notified of the assignment of the claim made May 20, 1861, which was before the passage of the confiscatino acts, had promised to pay it to the defendant in error on proper identification, and had, as claimed by us, certified the check. (See authorities, page 9, original brief.)

The whole cause turns on the assignment; that found *adversely* to the defendant in error here, and it would have left the court no further question to consider, but it having been found *in his favor* the case is equally left without further question to consider—for the assignment being found, there was nothing to confiscate; there is no subject matter, no support for confiscation proceedings, no Federal question to arise.

If the plaintiff in error had any *rights, privileges or immunities,* they did not exist by any Federal statute; on the other hand, under the common law, the defendant in error became entitled to the right and privilege of having his debt promptly paid and an "immunity" from these vexatious proceedings, now extending over a period of 17 years, to recover his claim.

II.

In view of the assignment having been found by the highest court of New York, no argument of the plaintiff in error can receive support founded on the assertion, that the plaintiff in error was obliged to pay over the money to the United States, and for such reason he has "immunity" from paying a debt which he had solemnly promised to pay to the defendant in error on the customary identification.

The United States had no authority or power to confiscate the property of the defendant in error, wholly irrespective of the question whether they had the power to confiscate the property of a corporate body, to date back to May 20th, 1861, before the confiscation acts went into effect, and while the United States had no power to seize, the Phenix Bank had full power to prevent the seizure of the indebtedness due from them not to the Bank of Georgetown, but to the defendant in error.

Their conduct is so singular in respect to the attachment, that they cannot escape some suspicion at least of collusion with the so-called informer, if, indeed, they were not the informers themselves, for the defendant in error called at the bank on the afternoon of January 4th, and before he went to the bank again, which was early the next morning, the attachment had been served, and he swears that no one knew of the matter, except the two officers of the bank and a friend who had promised to identify him. The Phenix Bank had honored drafts on the fund during the war. They were the correspondents in New York of the Bank of Georgetown, their depository, acting in a position of trust, in a fiduciary capacity, but they give no notice to the Bank of Georgetown of the seizure. Served with the attachment, and knowing the return day was too short in the ordinary course of communication to reach their principals, they make no application to court in behalf of their principals in order that they should have notice and opportunity to answer the grave charges against them, and protect their property. But the proceedings are hurriedly commenced, are precipitated to a default, without so far as appears the formalities of a newspaper advertisement, and they immediately pay over the money, and the spoils are divided.

We have said they need not have paid over the money. If on January 4, 1865, they became debtors to the defendant in error by virtue of the assignment from the Bank of Georgetown May 20, 1861 (at which time the Bank of Georgetown ceased to have any interest), as the Court of

Appeals have found, and as the learned counsel who now represent them would doubtless have advised them if they had taken the precaution of consulting them, the then marshal had nothing to attach, and they should have so certified or made proper return, and there was no power on earth to compel them to pay over the money if the Government had raised any question, until it were judicially determined.

Cushing *vs.* Laird, 107 United States Reports, page 69.

Supposing they had, on January 4, 1865, certified a check, as we claim they did this in law, could attachment proceedings of any court compel them to pay over the amount of the check?

Suppose, on the other hand, the plaintiff in error had reason to question the assignment or their liability after the promise, then they could have interpleaded in the United States District Court, the very court where the confiscation proceedings were pending.

The City Bank of New York *vs.* Skelton, 2 Blatch., 14.

In this connection, and in reply to the points of the plaintiff in error, to wit, that the defendant in error should have appeared in the confiscation proceedings, "that he preferred "the expedient of *impetration* upon executive officers at "Washington to intervention in the judicial contestation "before the court which had been mercifully provided)," &c., we reply:

(1.) No law compelled him, his property not having been seized, he not being a party to the suit, or served with any process.

(2.) But again, why should he encounter the expense and delay of a contest of all the questions which could arise in the confiscation proceedings before a single judge, when he had the constitutional right to go before a jury of his country, and that on the one issue whether the Phenix Bank had not promised to pay him on being notified of the assignment, or in other words, were not indebted to him.

(3.) Impetration so called on executive officers at Washington was the most natural course. Not wishing to resort to litigation, except as a last resort, he proceeded at once to Washington, and when he returned such had been the haste of the proceedings, that the informer or informers were enjoying the fruits of their well-earned ; labor the money had been paid over.

III.

But suppose this court should be of opinion. (1st.) That the validity of the Federal statute has been brough in question, or that the plaintiff has certain rights, privileges or immunities arising under a Federal statute. (2d.) That the New York Court of Appeals, in deciding the case, had necessarily to consider such question which was the controlling question, and without which they could not have decided as they did. (3rd.) And decided *adversely* to the plaintiff in error. (4th) And that the plaintiff in error has the right to ask this court, under the circumstances, to consider such question, and we respectfully submit in addition to what has been stated in the original points of the associate counsel for the defendant in error, that what purports to be the judgment record of the United States District Court, is in no sense to be considered as such, and that this court will not be bound in any manner by any statements or recitals therein, for the reason :

(*a.*) That with the exception of the affidavit as to costs and disbursements, there is not a scintilla of evidence, either by way of verification to what is called the "libel of information," or in respect to any fact upon which a proper decree of confiscation could be based.

There might be an apology for some proof if it appeared that the allegations of the libel, which is subscribed simply by the district attorney, were known to him, but, on the contrary, it is apparent that he did not know, and could not personally have had any knowledge in respect to a single allegation in the libel.

But further yet, some of the allegations must certainly be untrue. For instance: the allegation that the property was used for Confederate purposes, when all the while it was in a loyal bank in the City of New York.

Again, and more important still, as it goes to the very foundation of the proceedings, it is perfectly evident that between late in the afternoon of January 4th, and the early morning of January 5th, that there was no time to communicate with Washington and get the necessary executive authority to make the preliminary seizure herein, and the fact is contrary to the allegations that any seizure was made before the service of the process herein by the marshal.

(*b.*) Again, it is the universal practice, we believe, in admiralty, in case of default, not to enter the final decree, even on a sworn libel, without an interlocutory decree and order of reference to take proof as to the facts and report to the court.

In United States *vs. The Lyon*, 1 Sprague, 400, the court held that on default before a decree for forfeiture, it was "imperative there should be some hearing." That the court will require the prosecutor to introduce full proof of the allegations in the libel whenever the circumstances shall make it reasonable. Reference is made to the statute of 1799, chap. 22, the 89th section of which provided that the court shall proceed to hear and determine the cause according to law.

And in the seventh section of the Act of July 7th, 1862, the act under which these proceedings were instituted, we find that after providing for the forms of proceedings, &c., it enacted, "If said property, either "real or personal, *shall be found to* belong *to a person en-* "*gaged in the rebellion*, &c., there may be condemnation," &c.

In the confiscation cases (20 Wallace, 112), the court did proceed to hear and determine the case after the default was entered, and it was not until after such hearing and determination that the property was condemned. The court heard and considered evidence, depositions were taken and filed, and on the 18th day of March, 1865 (the order of publication having been made on September 15th, 1863), after consideration of the law and the "evidence," there was a decree by default. Said the court, (page 107,) "The District Court is one of limited jurisdiction, and that "it has jurisdicion of the particular case it has to "adjudicate must appear."

But where, we ask, does this appear by the record of the District Court? There is not a single recital in the Final Decree (fol. 183), except the issuing and return of the monition, proclamation and default, and yet it is argued that this court should receive the unsworn statements of such record as conclusive on the questions arising herein.

It is believed that not a single reported case can be found in which some proof was not taken. Even in Miler *vs.* U. S., 11 Wall, 102, the court examined proofs.

IV.

It is contended in the points for the plaintiff in error, that the authorities referred to in the opinion of the Court of Appeals, in support of the proposition, that there could be no confiscation proceedings in respect to a banking corporation, are not in point

We reply that it would seem that the Court of Appeals had full support in authority under the case of the Planters Bank *vs.* The Union Bank, 16 Wal., 496, where this court held, "that under neither of the acts was the property of a "banking institution made confiscable. Both of them had in "view the property of natural persons who were public "enemies, of persons who gave aid and comfort to the rebel- "lion," &c. * * * * "In no one of the six classes of persons "whose property was by the Act of 1862 declared subject "to confiscation, was an artificial being included."

It is claimed that this language is *dicta*, not necessary to decide the case before the court. But assume this to be granted, still we have it as the deliberate view of not only the judges of this court, but also that of the nine judges of the New York Court of Appeals, as to its being the proper construction of the so-called confiscation acts, and such construction receives full support for the one reason, if no other, that the property of the bank cannot be considered its own property strictly as such, nor can the deposits. It would be a very unjust law to condemn the deposits of a bank, "trust funds," the property, it may be of widows and orphans, simply because the president of the bank had done some personal act for which his own property might be confiscable under the acts.

V.

Care should be taken that while the plaintiff in error has the full benefit of all his constitutional privileges, that the defendant in error shall not be dragged to this court, after a litigation now extending over seventeen years, in which time the case has been before the Trial Term twice, three times to the General Term and once to the court of last resort of the State, on the mere pretext that because a Federal question arose, or might have arisen, the main point on which the case was substantially decided, having been decided adversely to the plaintiff in error, he may have the additional privilege of a review by this court of the decision of the New York Court of Appeals. In this view the language of the court in Murdock *vs.* City of Memphis, 20 Wal., page 629, is exceedingly pertinent.

VI.

It is finally submitted that there has been a uniform line of decision by the courts of New York, during the history of this long litigation except at the first trial term, and that this is a weight of authority not likely to be rejected, especially in view that the Court of Appeals in their decision have relied so largely on the authorities of this court, particularly in respect to the Federal question.

VII.

The writ of error should be dismissed for want of jurisdiction, or the judgment affirmed on the merits of the case.

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